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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 313.

HARVEY SPALDING, JAMES H. SPALDING, EDWIN W. SPALDING, JOSEPH C. JOHNSON and JULIUS LANSBURGH, Appellants,

vs.

GEORGE MASON.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANTS.

W. WILLOUGHBY,
Attorney for Appellants.

H. L. McQUEEN, PRINTER.

Supreme Court of the United States.

HARVEY SPALDING *et al*, Appellants,
vs.
GEORGE MASON, Appellee.
No. 313.

BRIEF FOR APPELLANTS.

Statement of the Case.

I.

This case comes to this court upon an appeal from a decree rendered by the General Term of the Supreme Court of the District of Columbia. The case will be more readily understood by considering first the subject-matter of the controversy. This grows out of a purchase by the complainant in the court below, Mason, from the defendant, Spalding, of an interest in fees of certain described claims of postmasters for moneys which would be due the said postmasters from the Government upon readjustment of their compensation under section 8 of the act of June 12, 1866.

Under the provisions of the act of June 22, 1854, 16 Stat. L., 298, postmasters were paid for their services by commissions on the postage collected at their respective offices, which commissions were adjusted by the auditor of the Post Office Department upon the returns for each quarter after the said returns had been made by the postmaster and received by the Department.

By the act of July, 1864, a complete change was made in the mode of regulating the compensation of postmasters. A salary system was adopted instead of the commission system. The salaries were fixed for two years in advance upon the basis of the business of the past two years; that is, the commissions upon the business of the past two years were computed at the rate fixed by the act of 1854, and the sum thus arived at was made the fixed salary of the office for the ensuing two years, a readjustment of the salaries of every post office to be made upon this basis every two years. Since

there was no necessary connection between the business of any office and the salary as thus fixed large deficiencies in salaries arose under this act of 1864 at offices where the business was rapidly increasing, and to correct these deficiencies Congress passed the act of June 12, 1866, directing the Postmaster-General to readjust salaries of postmasters when the quarterly returns showed that the salary allowed the postmaster was 10 per cent. less than it would have been under the act of 1854. The total failure of the Postmaster-General to make the readjustments provided for by the act of June 12, 1866, gave rise to the claims which the defendant Spalding was prosecuting before Congress in the year 1880, this court having decided in January, 1878, that the Court of Claims could not enter judgment for the amount due in any of these cases until after the Postmaster-General had made a readjustment; and to compel a readjustment a new act of Congress became necessary. Accordingly the defendant in the court below had brought the matter before Congress and by June, 1880, had secured favorable action on a bill in the Senate and a favorable report from the Post Office Committee in the House, and had in the meanwhile obtained contracts and powers of attorney in about 1,700 claims of this class and character and had, moreover, made a list of about 7,500 claims of this kind, including the 1,700 then in hand, so that he believed it reasonable to expect that if he had the means *he could within a year obtain contracts in sufficient other cases of this kind to make in all 4,000 in number.* To obtain the means to thus complete this business he made with the complainant in the court below the following contract:

"Harvey Spalding and George Mason, both of Washington city, in the District of Columbia, mutually covenant and agree with each other as follows:

"Harvey Spalding, having for several years been engaged in the prosecution of claims of postmasters and late postmasters for adjustment of their salaries in conformity to section 8 of the act of June 12, 1866, and having a large number of such claims now in hand, to wit, seventeen hundred or thereabouts, and being now engaged in the prosecution of said claims, and in securing for prosecution other similar claims, of which he expects to secure in the aggregate, including those in hand, about 4,000 in number, more or less, upon agreed fees equal to 25 per cent. of the amount, which shall be collected in each case; and having secured the passage by the Senate of Senate Bill 903, this Congress, and the favorable report of House Bill No. 3981 by the proper committee of the House of Representatives, which bills propose a basis for the settlement of the claims herein referred to, and the substance of which he expects to be enacted into law, and being in need of funds to conduct his said business to completion, hereby agrees to sell to said George Mason one-fourth of all his interest in said claims now in hand,

and all that he may hereafter secure, and one-fourth of all his fees therein, free from all charges for expense of prosecuting said claims to collection thereof, for the sum of twenty-five hundred dollars.

"The said interest and share in said claims and fees shall vest in said Mason on payment by him of said purchase-money, and a *pro rata* proportion of said interest and share shall vest in said Mason on payment of each installment of said purchase-money as hereinafter provided. The said Mason shall pay the said purchase-money to said Spalding as follows:

"He shall pay the sum of $100 on signing this contract and a further sum of $100 on or before the 12th of June, instant. He shall pay a further sum of $300 on or before the 5th day of July, prox., and a further sum of $750 on or before the 5th day of October next. He shall pay a further sum of $600 on or before the 5th day of November next, and a final payment of $650 on or before the 5th day of December next.

"It is further agreed that a due proportion of all the powers of attorney and contracts for fees to cover the interest of said Mason shall be transferred to him by said Spalding by proper indorsements of substitution on the powers of attorneys and assignments, indorsed upon the contracts, and said fees may be collected by the said Mason and an account thereof shall be kept, and all the fees collected by the said Spalding shall be accounted for, and settlements shall be made from time to time as collections are made, and a division thereof shall be made, three-fourths going to said Spalding and one-fourth to said Mason. The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can, and to make contracts for fees equal to 25 per cent. of the collections and to subject the whole to be shared, together with those in hand, by said George Mason for the consideration hereinbefore specified.

"And the said George Mason agrees and binds himself to pay over to the said Harvey Spalding the whole amount of said sum of twenty-five hundred dollars within the time and in installments as hereinbefore specified, unless he shall elect to pay the whole of said sum within a shorter period than the time named.

"In witness whereof the said parties have hereunto set their hands and seals this 3d day of June, A. D. 1880.

"HARVEY SPALDING, [Seal.]
"GEORGE MASON. [Seal.]"

(P. 2.)

II.

On March 3, 1883, Congress passed an act authorizing and directing the Postmaster-General to make readjustments of the salaries of late postmasters under the provisions of the act of June 12, 1866,

where such readjustment had not been made, and after a long controversy between the defendant in the court below and the Post Office Department as to the manner in which the adjustments and payments should be made the Department began to make adjustments and payments according to a rule which will be more particularly described hereafter, and the defendant, Spalding, presented some thousands of applications to the Postmaster-General for adjustments and allowances under the rule adopted and followed by the said Department, and obtained several thousand allowances and some thousands of dollars of fees, all of which will be more particularly related hereafter. In October, 1887, the complainant, Mason, filed his bill in the court below to obtain a discovery of fees collected by the defendant, and to have an account taken thereof, and for the appointment of a receiver for the defendant's business. The bill alleged the payment of the $2,500 mentioned in the contract hereinbefore set forth; that the substance of the House Bill No. 3981, therein mentioned, became a law March 3, 1883; that a large number of claims had been allowed and paid, and a very large amount of fees had been collected, and that a very large number of claims had also been allowed and would soon be payable, although not paid at the time of the filing of the bill, amounting in all to about $190,000; that the complainant was entitled to at least $20,000 out of fees already collected by the defendant; the complainant claimed that he was entitled to an interest, not only in the claims estimated by the terms of the contract to be about 4,000 in number, under the provisions of section 8 of the act of June 12, 1866, but also in all claims filed by the defendant under the provisions of the act of March 3, 1883, and the act of August 4, 1886. The bill prayed for discovery under oath, account, an injunction, and receiver.

III.

The answer of the defendant, which was under oath, as called for, and which is therefore evidence, and is substantially sustained by the proofs, admitted the execution of the contract and further stated as follows (p. 15):

It is true that in June, 1880, this defendant ever since the year 1871, had been laboring in various ways and at much expense to establish the claims of postmasters therein mentioned.

It is also true that about June 1st, 1880, this defendant, being in great need of money for expenses in connection with that business, made an application therefor to the complainant. As ground of that application this defendant explained to the complainant his whole business situation and prospects in the above relation. Amongst other things he referred to the probability that one or other of two bills then pending in Congress and bearing upon that

business would be enacted, to wit: That Senate Bill 903 had already passed the Senate while House Bill 3981 had received a favorable report from the appropriate committee. At the same time the difference in provision by those bills was discussed, and that Senate Bill 903, which made provision for fewer postmasters than House Bill 3981 did, was, from its situation upon the calendar, more likely to be enacted. And this defendant then stated to the complainant that in the course of the nine years for which he had been engaged in that business he had prepared lists of the names of some 7,500 postmasters, who, he was satisfied, would, in part or all, be included in the provisions of such bills, and also that of these about 1,700 had already duly authorized him to prosecute such claims as their attorney, with a stipulated compensation equal to 25 per cent. of what should be recovered, whilst he had good grounds to believe that in the end he would be so authorized by some 4,000 of these.

In the course of the same application it was said and understood between the parties that the classes of postmasters included in the bills and previous legislation would be paid the difference between the amounts of any salary which, during a particular period, they might already have received and the amount of such commissions as, but for legislation in 1864 and after, they would substantially during the same period have received. And it was also then distinctly stated to the complainant by this defendant that it was upon this understanding and theory that the latter had made up the lists aforesaid, as well as had taken the powers of attorney and formed expectations as to the number of clients whom in the end he might procure as above stated.

And this defendant then told the complainant that under the narrower relief of Senate Bill 903, which seemed also, as above stated, the more likely of the two to become a law, he estimated that the whole amount of claims that probably he might collect would be worth about $75,000, and his own fees, consequently, about $18,750; whereas, if House Bill 3981 were enacted, those amounts would be, respectively, about $400,000 and $100,000.

The answer furthered admitted (p. 16) the failure of the two bills mentioned in the contract and says that neither of the said bills contained the proviso of the act of March 3, 1883, which proviso was to the effect that all drafts in payment of the claims of such postmasters should be transmitted directly to the claimants themselves and were not to come to the hands of the attorneys prosecuting such claims.

The answer further stated (p. 16) that House Bill No. 3981 was defeated January 17, 1881, and as there was no chance of the Senate Bill then passing Spalding was then inclined to go no further in the prosecution of such claims, but that Mason then urged him to continue his efforts to promote the necessary legislation, and

thereupon an oral contract was made according to which the complainant promised that the defendant would continue the attempt to promote such legislation and to get in and prosecute such claims the complainant would share in all the expenses thereof; that relying upon this new contract the complainant continued his efforts until March 3, 1883, when the act was passed to compel the Postmaster-General to make the readjustments required to ascertain the amounts due the postmasters under Section 8, of the act of June 12, 1866, and that in the meantime the defendant had expended about $4,500 in getting in such claims and in the necessary and legitimate expenses of procuring the legislation; that the complainant, however, failed to contribute towards such expenses and in September, 1882, the defendant notified him that in consequence of such failure he should consider that he had a right to put an end to the contract, and that he did then put an end to the said contract, but that he was willing to repay him the $2,500 and that in case of success he was willing to allow the complainant $10,000.

The defendant further answered as follows (p. 18):

"This defendant says that besides the 1,700 claims in his hands upon the 3d of June, 1880, he had received by the 17th of January, 1881, some 500, and also between the latter date and March 3d, 1883, he had procured enough more of these to make in all 4,208, all of these being included in the list of 7,500 first above mentioned.

"Farther answering, this defendant saith that in administering the act of March 3d, 1883, the Postmaster-General, in May, 1883, announced a construction thereof, and of the act of 1886, referred to therein, which contradicted the construction assumed as above by the parties thereto as a basis of the contract of 1880 and by this defendant in making up the list of 7,500 cases aforesaid. By this construction of the Postmaster-General the 10 per cent. increase mentioned in said statute did not mean such increase within any one quarter of the year, and therefore did not authorize an addition to compensation, either in such quarter or the quarter succeeding that, but meant such increase through a biennial term of quarters, and that it authorized such additional compensation in any case only for the succeeding biennial term. In February, 1884, this construction was concurred in by the Attorney-General. One effect thereof has been to defeat much the larger part of the 1,700 claims and claimants aforesaid, and also much the larger part of the 4,208. Another effect has been to substitute for this class of defeated claims and claimants a much larger number of others entirely different in title and in person, being such, indeed, as theretofore, so far as this defendant is informed, had not been thought of.

"This defendant earnestly contested the considerations which pointed to the above-mentioned construction, both before the Post-

master-General and afterwards before the Attorney-General. Nevertheless, in July, 1883, apprehending that such construction might become final, he for the first time began to adapt his business thereto and to correspond with persons who might probably be included within its benefits. Gradually this new class of business increased, and upon the whole this defendant has received for prosecution about *20,000 cases of postmasters other than any who were upon his list in June, 1880*, or who had been by him thought of as having claims under the act aforesaid at any time before the month of May, 1883.

"This defendant says that upon the 4,208 claims aforesaid this defendant has, up to the present time, collected for fees $36,169.75, and that owing to the change as aforesaid in the previous method of collecting fees made by the act of 1883, as well as to certain circulars thereunder issued by the Postmaster-General, he has been put to an expense of about 10 per cent. to collect such fees after the allowances had been made in respect of which these were due. * * * He also says that upon cases amongst the 4,208 aforesaid there has been farther allowed by the Post Office Department, but not yet appropriated for by Congress, enough to warrant $10,790.78 of other fees, or fees that, upon his past experience as above in making collections, will probably net him some $8,500. This defendant believes and says that after the allowances upon which these latter fees are due shall have been paid no more money will be coming to any of the 4,208 claimants under the above construction of the act of 1883. He denies that, excepting what may be due to the complainant upon the above statement, after deducting therefrom what he has already received thereabouts, any debt is or will at any time be due to the said complainant by this defendant because of the contract of June 3d, 1880, and subsequent dealings betwixt the parties thereto.

"And this defendant submits to an account in regard to the 4,208 cases." (Pp. 19, 20.)

(Filed Dec. 6th, 1887.)

Exceptions were filed by the complainant to the foregoing answer for insufficiency, upon the hearing of which the court sustained the exceptions and required the defendant to put in a full answer. (See p. 21.)

The further answer (p. 22), of defendant submits two schedules, A and B, the former containing a statement of fees collected by defendant from the 4,208 cases above mentioned. The latter contains an account of about 20,000 cases in the answer originally mentioned.

The aggregate of cases prosecuted by defendant is 24,359.

Allowed and paid.....	5,045 00
Allowed but not paid	8,009 00
Fees collected on cases paid.....	$89,990 10
Fees in cases allowed only.....	$107,331 42

The expenditures incurred and paid by defendant in clerk-hire, printing, office-rent, postage, discount, interest, &c., in prosecuting the above business, since the 17th day of January, 1881, are as follows:

On the 4,208 up to March 3, 1883.....												$4,500	00
On all from March 3d, 1883, to Dec. 31st, 1883.												7,126	11
"	"	"	Dec. 31st, 1883,	"	"	"	1884.					11,744	22
"	"	"	"	"	1884,	"	"	"	1885.			10,856	25
"	"	"	"	"	1885,	"	"	"	1886.			21,494	78
"	"	"	"	"	1886,	"	"	"	1887.			8,827	39
Total.....												$64,547	75

This statement does not include the 10 per cent. mentioned in the original answer as expensive of collecting the fees.

That defendant has paid the plaintiff on account of the business aforesaid in the year 1884 and since $3,310.

That a complete record of all of the claims prosecuted by defendant are contained in books, jackets and other papers in his office, free access to which is tendered to the complainant as and for the discovery asked for by the bill.

(Filed February 16th, 1888.)

Issue was joined upon this answer, and testimony was taken by both parties, and the cause coming on to be heard, the court decreed (p. 108) that the complainant is entitled to have and recover from the defendant one-fourth of each and every fee which has been collected or received by the defendant, or which hereafter may be collected or received by him for such claims prosecuted by him for postmasters and late postmasters for readjustment of their salaries pursuant to the act of Congress passed March 3, 1883, in complainant's bill mentioned, which are included in the list of about 7,500 claimants in the answer of the defendant mentioned, and that the complainant is not chargeable with any part of the expense of the business of securing and forwarding such claims. It further ordered, adjudged and decreed that the complainant is not entitled to any part of the fee or fees which have been, or which hereafter may be collected or received by the defendant from any claimant not embraced in the said list of about 7,500 claimants.

From this decree the complainant appealed to the General Term and the court there affirmed the decree in all respects (p. 110), holding that no objection to it by the defendant could be there made as he had not taken an appeal.

By this decree an account was ordered to be taken by the Auditor of the fees obtained from the claimants comprised in the list of 7,500 claims.

Thereupon the Auditor stated an account and found a balance

from the defendant to the complainant, besides interest calculated upon monthly balances, of $13,669.11 (p. 115).

To this the defendant excepted (p. 176) upon the grounds that complainant was allowed an interest in claims not secured by the defendant directly but through other attorneys, and on claims registered in the book containing the 7,500 names but designated by half numbers, and not belonging to the original list of 7,500 claims, and in a fee paid by George Phillips as a gratuity in excess of the 25 per cent. agreed upon, and because the defendant was not allowed 20 per cent. or some other per cent., or some amount in gross, for expenses incurred in collecting the fees, and because he was charged with interest on monthly balances. The exception in regard to interest was sustained, but the court in General Term overruled the other exceptions, and thereupon decree was entered by the General Term in favor of the complainant and against the defendant for $13,669.11 with interest thereon from August 9, 1887 (p. 179), and from this decree the defendant has appealed to this court.

IV.

Assignment of Errors.

1st. The court erred in allowing to the complainant an interest in all or any of the claims embraced in a list of 7,500 claims mentioned in the answer of defendant.

2d. The court erred in holding that the claims contemplated by the parties when they executed the contract of June 3, 1880, were of such a nature that they could be regarded for the purpose of giving the complainant an interest therein as the same claims that were actually prosecuted and collected under the act of 1883 and August 4, 1886.

3d. The court erred in allowing the complainant $9,972.88 as his share of fees collected by the defendant on claims paid at various dates between October 1, 1886, and May 1, 1889, as all of said fees were collected upon claims allowed and paid neither under authority of section 8 of the act of June 12, 1866, or under authority of the act of March 3, 1883, but under the sole authority contained in the act of August 4, 1886, Vol. 24, Stat. L., p. 308. (See pps. 116 and 117 of Record.)

4th. The court erred in not holding that the contract of June 3, 1880, became of no effect by the failure of passage of the bills in Congress mentioned therein and in not holding that thereupon a new contract was made which became of no effect in charging the defendant with any liability thereunder by reason of the failure to the complainant to perform the same on his part and by the putting an end thereto by the act of the defendant.

5th. The court erred in holding that the complainant was entitled to one-fourth of all fees which have been collected out of the

said list of 7,500 claims which were procured subsequently to January 17, 1881.

6th. The court erred in holding that the complainant was entitled to one-fourth of all fees which had been collected out of the list of 7,500 claims which were procured subsequently to March 3, 1883.

7th. The court erred in allowing complainant an interest in fees in claims registered in the same book as the 7,500 claims but inserted at a different time, and designated by half numbers.

8th. The court erred in holding that the complainant was not chargeable with any part of the expense of procuring claims obtained by the defendant subsequent to January 17, 1871.

9th. The court erred in holding that the complainant was not chargeable with any part of the expenses of prosecuting claims obtained by the defendant after March 3, 1883.

10th. The court erred in holding that the complainant was not chargeable with any part of the expenses of securing and collecting fees which were incurred in consequence of the proviso of the act of March 3, 1883, and of a circular issued by the Postmaster-General to make difficult the collection of the fees.

11th. The court erred in not allowing to the defendant twenty per cent. or some per cent. or gross amount, for expenses in collecting fees.

12th. The court erred in allowing to the complainant interest from August 9, 1887, up to the time that the balance claimed to be due was ascertained by the court.

13th. The court erred in not dismissing the bill of complainant with costs.

V.

This court is not prohibited from considering the objections to the first decree because an appeal was not taken therefrom by the defendant to the General Term. By Sec. 772, R. S. D. C., an appeal may be taken from a decree by the Special to the General Term as to any matters which involve the merits of the proceeding. An appeal may thus be taken from an interlocutory decree, from one term to another term of the same court, that is, though it is a Special Term and the other General Term, it is the same court. When affirmed by the General Term it is still an interlocutory decree and is still within the breast of the court. Mix's Appeal, 35 Conn., 121; 95 Am. Dec., 222; Hamilton *vs.* Pleasants, 31 Texas, 638; 98 Am. Dec., 551; Dist. of Col. *vs.* McBlair, 124 U. S., 320.

When the case came before the General Term the second time *upon the appeal of the defendant*, it was then within the power of the court to act upon the objections to which the first decree was liable, and in not correcting the errors of the first decree it then committed an error which is the subject of review by this court.

It does not follow, that, because the General Term could not review objections by the defendant to an interlocutory decree for the reason that he did not take an appeal to the General Term, he is thereby precluded from a review by this court when an appeal is regularly taken by him from a final decree to the General Term and then from the General Term to this court.

Cases appealed to the United States Supreme Court are "re-examined" in the same manner as cases coming from the Circuit Court. Sec. 705, R. S., U. S.

In such cases of course any error in the case, whether it be in an interlocutory decree, or in the final decree, may be corrected by this court, and if it can be done in cases coming from the Circuit Court it can be done, by the express direction of the Statute, in cases coming from the General Term of the District of Columbia. See *Ex Parte* Jordan, 94 U. S., 251; R. R. Co. *vs.* Soutter, 2 Wall., 510–521.

VI.

The claims which were the subject of the contract were entirely different in their nature from those that were finally allowed and paid, and in which the complainant was decreed a share by the court below.

In his first and second assignment of error the defendant maintains that the court erred in decreeing to the complainant any share of these collected by the defendant, and this contention is based on the entirely different nature of the claims allowed and paid from those which were in both the mind of the complainant and of the defendant at the time the contract was made, and which accordingly formed the subject-matter of the contract. The claims which were in the list of 7,500 claims were talked over and fully explained by the defendant to the complainant (p. 30), and the latter must have understood them thoroughly, their legal and equitable rights, or he would never have purchased the interest in the claims. This distinction between the claims first prosecuted and those actually allowed runs through the whole case, in the pleadings of both parties, the decision of the court and the report of the Auditor. The court in its opinion recognizes this fully and bases its decree upon this distinction. The court says, in speaking of the construction given to the act of 1883, by the Postmaster-General (p. 105): "The effect of this was, as is agreed and as stated in the pleadings of both parties, to change the class of claims very materially." The decree provides that the complainant is entitled to one-fourth of the fees on claims prosecuted pursuant to the act of 1883, which are included in the list of 7,500 claims which, as the court says in its opinion, were in the minds of the contracting parties, that is, that the claims in which he is entitled to an interest must not only

be those prosecuted under the act of 1883, but also have been in the minds of the parties when considering the list; that is to say, if there were any claims in such list that were of the character finally recognized by the act of 1883, in those the complainant has an interest. The defendant holds that the court below was right in saying that only the claims in the minds of the parties at the time of the contract were the subject of that contract, but wrong in not applying this reasoning to all the cases in which payments were made, since it appeared plainly from the record that the payments made were not payments of any claims known to be existing to either of the parties to the contract at the time the contract was made. The fact that some of the parties on the list of 7,500 also had claims under the rulings of the Postmaster-General and the act of August 4, 1886, but differing entirely in the nature of the claim, both as to the reason for the allowance, the amount, and the dates of service for which the allowance was made, is simply a coincidence, but does not alter the fact that none of the claims mentioned in the contract has ever been either wholly or partially paid. This distinction between the claims actually paid and those mentioned in the contract goes to the very heart of the case and warrants us in making a somewhat extended examination of the two classes.

We have seen in our statement of the case that the defendant was engaged in prosecuting before Congress at the time the contract was made claims of late postmasters for readjustment of their salaries under the act of June 12, 1866. Beginning with July 1, 1864, the postmasters were paid a salary, fixed for two years in advance on the basis of the business of the office for the prior two years, this system having been substituted for the previous system of the act of 1854, by which the postmasters were allowed a certain commission upon the business done each quarter. During this term of 1864–1866 a great number of the postmasters at offices where the receipts and business rapidly increased found that they were being deprived by the new salary system of the increased compensation they would have received had the act of 1854 not been superseded. They complained to Congress and finally Congress on the 12th of June, 1866, directed that the Postmaster-General should readjust the salaries of postmasters of the 3d, 4th, and 5th classes when their returns showed that the salary allowed was 10 per cent. less than it would have been under the act of 1854. The expressions of this statute, the reasons given for the readjustment, give claims arising under it a marked individuality and show conclusively the intention of Congress to provide increased compensation for postmasters wherever there was a difference of 10 per cent. between the salaries allowed them, and what they would have received in commissions under the act of 1854. Claims under this statute were in existence in 1880 because the Postmaster-General had neglected his duty

under it, and this court having decided in the first McLean case, in January, 1878, in a suit against the Government brought under this very statute, that there could be no recovery against the Government until the Postmaster-General had made the readjustment contemplated by the act, there was no resource for the claimants and their attorneys but to procure from Congress a new order to the Postmaster-General to make such readjustments.

This was the work and these were the claims upon which the defendant was engaged in 1880, when the contract was made, and no claims but these claims for increased compensation under the act of June 12, 1866, was in the mind of either party to the contract.

It appears from the testimony in this case and from the records of this court that not one such claim has ever been paid, and that they still remain unadjudicated and unpaid claims against the United States. At the October term of this court, in 1892, an attempt was made in this court, *ex rel* Elizabeth Trask, No. 1232, to obtain a writ of mandamus against the then Postmaster-General, to compel a readjustment of salary under this act of June 12, 1866. The record in that case shows a large deficiency in the compensation of the postmaster for three biennial terms, and that notwithstanding such 10 per cent. deficiency the Postmaster-General refused to make a readjustment or payment. This attempt for a mandamus failed, and the claims still remain as claims merely against the Government.

The claims that were paid, as shown by the testimony, were of an entirely different nature and were not thought of by either party at the time of making the contract or for many years after. After the passage of the act of March 3, 1883, the Post Office began to make allowances in alleged compliance with the act, but it is shown by the testimony that such allowances were made entirely on the basis of the act of 1864, without any reference to the act of June 12, 1866. It will be noted that the act of 1864 required a readjustment of all salaries every two years, and that salaries were then fixed for two years in the future upon the basis of the business for the past two years. Exactly this method was adopted in alleged execution of the act of 1883, and it is plain that there would have been no allowances at all under the act of 1883 had it not been for a fact in connection with the readjustments which may have been overlooked by the authorities when they decided to make allowances in this manner. That fact is that under the act of 1864 the Postmaster-General had discretion in fixing the salaries for future terms, and instead of fixing the salaries on the exact basis of the business of the prior two years the course was generally adopted when the business of an office was seen to be falling off that the last quarter or two quarters was taken as the basis for fixing the salaries, and in this way a salary was fixed which was less than it would have been had the average for the

whole two years been taken as the basis. Owing to this fact when the re-execution of the act of 1864 was undertaken after the passage of the act of 1883, many thousands of cases were found entitled to allowances under this method, but it is plain that such claims and allowances had no reference to or connection with the act of June 12, 1866. Under the latter act allowances were only due, and possible, where the business of an office increased, and the increase of salary was to compensate for the increased business; and there could be no readjustment unless there was the difference of 10 per cent. mentioned in the law. The claims actually paid, on the contrary, were at the post offices where there had been a decrease of receipts, and where the postmasters had in general already been paid more than their commissions under the act of 1854 would have been.

The following copy of a protest sent to the then Postmaster General by the defendant June 1, 1885, will illustrate this distinction.

"WASHINGTON, D. C., *June 1, 1885.*

"HON. W. F. VILAS, *Postmaster-General.*

"SIR: Referring to your resolve to adhere to the method of adjustment of postmasters' salaries now in progress in the Department, although there are many communications of mine on file showing the same facts and results, I desire to call your personal attention to the following statement:

"The method of adjustment now in progress is a review of biennial adjustments under the original act of July 1, 1864, (long since repealed,) and is therefore wholly without warrant of law.

"The readjustments denied are those provided for in the act of March 3, 1883, and such denial is in manifest disregard of existing law.

"Adjustments of salaries without warrant of law involve the payment, by the acts of the Postmaster-General, of money out of the Treasury without warrant of law, while denying payment of money to claimants, which the law commands to be done.

"The method of adjustment now in progress, if carried on to completion, will involve the payment, without warrant of law, of about $2,000,000, and leave the law in full force, which requires the payment to certain postmasters of the difference between the salary allowed and the commissions, where such difference amounts to ten per cent.

"The figures showing these results, when completed, will necessarily go before Congress and the country.

"I cite two cases by way of illustration, and all the adjustments made and paid are also referred to in verification. Congress and the people are as yet deceived, and the truth is only known to the extent that I have been able to make it known.

"J. K. McLean served as postmaster at Florence, Kansas, from

July 1, 1871, to July 1, 1872, and the commissions amounted to $560; and the pay allowed was $7, being an excess of commissions over pay of $553. The rule now followed has been applied to his case, and denies him any allowance whatever.

"Mr. W. T. Mackinson was postmaster at Lapidum, Maryland, from July 1, 1866, to July 1, 1868, and his commissions amounted to $154; and the pay allowed was $166, or $12 in excess of commissions.

"The rule now being followed, which the newspapers say is to be adhered to, has been applied to Mr. Mackinson's case, and he has been allowed and paid, *in addition* to the $166 formerly allowed, $688.38.

"I present this letter as the last of my protests against this course of action, and leave the responsibility for same wholly with you.

"Respectfully,

"HARVEY SPALDING,

"*Attorney for Certain Postmasters and Late*

"*Postmasters claiming under Act of March 3, 1883.*"

The following quotation from Senate Ex. Doc. 189, 49th Congress, 1st session, of June, 1886, will also illustrate the distinction between the classes of claims:

"* * * I respectfully beg leave to add that the interpretation of the act of 1883 has been the subject of contention between this Department and a person claiming to represent as an agent or attorney some postmasters who have made claims for additional compensation under that act. This contention arose in 1883 under the administration of the Department by Postmaster-General Gresham. With the concurrence of the Attorney-General of the United States at that time, Postmaster-General Gresham determined that the duty of the Department was to make readjustments which, under the requirements of the act of June 12, 1866, might, or should, have been made from time to time, and in the same manner in which they were required to have been made under the act of July 1, 1864. Under this theory the adjustments were made for which the two appropriations that have been disbursed were provided by Congress. It is contended, however, that the interpretation so given to that act is not in accordance with its true intention. If another construction shall be placed in that act by the courts, or by Congress, the readjustments which have been made are necessarily erroneous, and the amounts found due under this rule of construction do not correctly express the obligations of the United States, nor are they awarded to the proper persons, in very many instances at least. It is obvious, therefore, that no further appropriation can be made without incurring the risk of misdirecting the just expenditure of the money, unless the theory of admin-

istration of the act in question which has heretofore prevailed shall be ratified by Congress.

"In the last annual report of the Department, which the President laid before Congress, the substance of this matter is briefly stated, and the obligation to continue the administration of the act according to the interpretation which had been previously put upon it in the Department declared. If that intepretation be not in accordance with the purpose of the Congress, it is respectfully submitted that the true intention shall be explicitly settled before further appropriation is made.

"Very respectfully, your obedient servant,

"WM. F. VILAS,

"*Postmaster-General.*

"To the President *pro tempore* of the Senate."

We will still further illustrate the distinction between the two classes of claims by stating two suppositious cases, the testimony in support of which is in the record.

"A" was postmaster from July 1, 1866, to July 1, 1868, and from July 1, 1868, to July 1, 1870, and from July 1, 1870, to July 1, 1872. His compensation in the first term, adjusted on July 1, 1866, upon the commissions at that office between July 1, 1864, and July 1, 1866, was $100. If he had been paid for that term on the basis of commissions prescribed by the act of 1854 he would have received $200, as was disclosed by an examination of the returns between July 1, 1866, and July 1, 1868, which examination of course would be made at the end of that term. In the same way he was paid $200 for the term between July 1, 1868, and July 1, 1870, adjusted on July 1, 1868, on the basis of commissions of the office between July 1, 1866, and July 1, 1868, whilst if his compensation had been adjusted at the end of the term on the returns between July 1, 1868, and July 1, 1870, he would have received $400. There was a deficiency in his pay for the first term of $100 and for the second term of $200, which deficiencies in both cases would have been allowed and paid if a readjustment under the act of 1866 had been made and reported. In the third term, by reason of a decrease in "A's" receipts in the end of the second term, the Postmaster-General reduced the salary at that office on the 1st of July, 1870, to $300 for the ensuing term ending June 30, 1872, and an adjustment of his compensation on the first of July, 1872, upon the returns between July 1, 1870, and July 1, 1872, would not have given him more than $300 by reason of the decrease in receipts.

In the transformation which occurred "A" was denied the deficiency of $100 in the first term and $200 in the second term, but he was allowed $100 in the third term. This was done by allowing the salary in the first term as the salary in the second term and the salary in the second term as the salary in the third term.

"B's" case will further illustrate this transformation. In the first term his salary, adjusted on the basis of commissions for two years before, made on the 1st of July, 1866, for the term ended on June 30, 1868, was $400. On the 1st of July, 1868, upon the examination of his returns between July 1, 1866, and July 1, 1868, it appeared that his compensation on the basis of commissions for that time amounted to $400, the same as was paid him, but towards the end of this term his receipts fell off, by reason of which the Postmaster-General reduced his compensation on the 1st of July, 1868, for the ensuing term ended June 30, 1870, to $300, but on July 1, 1870, it appeared upon reviewing the returns between July 1, 1868, and July 1, 1870, by reason of the decrease in receipts, his compensation by commissions amounted to no more than $300. In "B's" case the Postmaster-General allowed him $100 additional pay for the term between July 1, 1868, and July 1, 1870. This was done by making the $400 salary between July 1, 1866, and July 1, 1868, not his salary for that term but his salary for the succeeding or second term.

The defendant had listed no claim like that of "B's" and no claim like that of "A's" in the third term. He had listed only claims like "A's" in the first and second term, and it was these claims only that the contract was made about.

We believe we have now made our position clear, that none of the claims mentioned in the contract have ever been allowed or paid; that, in fact, they have all been disallowed by the Postmaster-General. The claims contemplated in the contract are those for readjustment of salary under the provisions of the act of June 12, 1866, by reason of the non-execution of that law. The claims allowed and paid, if they had any basis at all, arose from what the Postmaster-General treated as a failure to properly execute the act of 1864 in making the biennial readjustments of salaries under that act. The latter were not the subject of any contract between the parties to this suit, and did not arise until after the passage of the act of 1883. It is plain that the complainant took his risk of the collection of the claims and has lost, for though an act of Congress was secured which it was supposed would bring about the payment of the claims such has not been the result, and no way has yet been found to secure the payments. It is equally plain that the defendant was at full liberty to contract with claimants for the collection of claims arising under the policy adopted by the Department, including those whose claims under the act of June 12, 1866, were in hand, or in the register of the 7,500 cases, without any liability whatever to account to the complainant therefor. The fact that some of the claimants would have claims of both kinds was merely an accident. It was in no ways the necessary result of the policy adopted, nor were the claims for the same period of time, nor for the same amounts. In fact they were as entirely distinct

claims as if the parties had themselves been distinct. The court below acknowledged the distinction between the claims where the parties happened to be different, and we fail to see how the accident of their identity can give the complainant any more rights than he would have had the new claims arisen in different persons. The court below was illogical in not carrying its reasoning to its proper conclusion.

As to all of the claims allowed and paid, and subjected to the contract of June, 1880, by the decree of the court below, we therefore hold that they are entirely distinct and different claims from those mentioned in the contract, and that it necessarily follows that the defendant had a right to take advantage of his position with regard to the claims, his knowledge of the parties who would be entitled under the policy adopted by the Department and contract for the collection of such claims without being bound to share in the fees from such claims with the complainant. The actual result of the practical construction of the act of 1883 was thus to disallow all the claims which the contractors had in mind and to create an entirely new class of claims, although all this was done up to August, 1886, in alleged compliance by the Department of the terms of the act of 1883.

VII.

We now wish to call the attention of the court to our third assignment of error, which relates to $9,972.88 of the decree entered by the court below. All the readjustments and payments up to August 4, 1886, had been made in alleged compliance with the act of 1883. On that date Congress passed the following law, entirely altering and changing that act of 1883, as appears upon its face, and all allowances and payments after that date were made under direct authority of this act of 1886, and not of the act of 1883. The act is as follows (24 Stat. at Large, p. 307):

"*An Act Making an Appropriation to Supply Deficiencies, etc.*

"SEC. 8. For compensation of postmasters readjusted because of the act of March third, eighteen hundred and eighty-three, and to pay the several amounts reported by the Auditor of the Treasury for the Post Office Department as due and unpaid, payable from deficiency in the postal revenue for eighteen hundred and eighty-three and prior years, three hundred and eighty thousand two hundred and nine dollars and forty-six cents:

"*Provided*, That the method of reviewing and readjusting the salaries of postmasters and late postmasters of the third, fourth, and fifth classes (under the classification of the act of July first, eighteen hundred and sixty-four) during the period between July first, eighteen hundred and sixty-four, and July first, eighteen hundred and

seventy-four, which has been practiced in the Post Office Department under and since the act of March third, eighteen hundred and eighty-three, (entitled 'An act authorizing and directing the Postmaster-General to readjust the salaries of certain postmasters in accordance with the provision of section eight of the act of June twelfth, eighteen hundred and sixty-six,') by which all such reviews and readjustments have been made prospectively for the biennial periods provided for in the said act of July first, eighteen hundred and sixty-four, upon the basis of the quarterly returns of postmasters during the preceding biennial periods, respectively, whenever the salary actually paid was ten per centum less in amount than such salary should have been if adjusted correctly upon such returns, by computing what the commissions upon the same would have been under the act of June twenty-second, eighteen hundred and fifty-four, and averaging the amount thereof annually, as directed by the act of July first, eighteen hundred and sixty-four, for fixing salaries, is approved and ratified as a correct administration of the aforesaid act of March third, eighteen hundred and eighty-three, and of all other acts applicable thereto; and that the several readjustments which have been made are ratified as a correct disposition of the several claims which have been considered and disposed of, and for which this appropriation is made; and the several persons to whom amounts have been respectively found due are declared the rightful persons entitled to the same, and such amounts to be the full sums due upon any and all such claims.

"And that all claims in excess thereof, and all other claims for readjustment which have been examined and found by the proper officers of the Post Office Department not entitled to readjustment within such rule of administration, are disallowed and barred.

That no claim for review or readjustment of any such salary shall be hereafter considered unless the same shall be presented to the Post Office Department before the first day of January, eighteen hundred and eighty-seven.

"And that in considering all claims not readjusted the same method shall be pursued which is hereby approved.

"And any and every different method of readjustment of salaries of such postmasters and late postmasters during the period between July first, eighteen hundred and sixty-four, and July first, eighteen hundred and seventy-four, than is herein approved, is hereby prohibited.

"And no action or suit shall be maintainable in any court against any officer of the United States by reason of his action in reviewing or refusing to review, or allowing or disallowing, any application for readjustment of any such salary.

"*And provided further*, That payment of all sums hereby appropriated shall be made by warrants or checks, as provided by the said act of March third, eighteen hundred and eighty-three, payable to

the order of and transmitted to the persons entitled respectively thereto."

It follows that after the enactment of this law all payments were made by its authority. This act entirely supersedes the act of 1883, so far as the Post Office Department is concerned and is the sole authority under which adjustments and payments could be made after its passage. No such act is mentioned in the contract nor are any such claims mentioned therein. In fact, this new act forbids the allowance or payment of any claims which were mentioned in the contract. After this act it could no longer be maintained, even if it could be before, that the claims were allowed and paid under some construction of the act of 1883, in which the complainant was entitled to share, since after this date it was no longer a question of construction of the act of 1883, but of the act of 1886, which the defendant had in no manner bound himself to try to secure, was not mentioned in the contract, and which was in fact adverse to all the claims represented by the defendant at that time. It appears from the record that the sum of $9,972.88 has been allowed the complainant by the court below as a share on the fees collected in claims paid, and allowed under this act of 1886 (pp. 116, 117). That an entire change in the law was made, and an entirely new class of claims received legal sanction thereby, is plain from the words of the law itself, and to our minds it is equally plain that the complainant was entitled to no share in such claims, since they had no existence at the time of the making of the contract, since they were not the claims which the defendant had been employed to collect, at that time, by the claimants. To get the new claims it is manifest that the defendant had to contract anew with the claimants, since the authority to collect a claim under the act of 1866, or of 1883, did not carry with it any authority to collect the new claim under the act of 1886, the authority to collect which might have been given to any other attorney as well as to the defendant, without any breach of contract on the part of the claimants.

VIII

The obligations of the contract were at an end, when the bills upon which it was based were defeated in Congress, January 17, 1881, and also by reason of the substitution of a new oral contract, which also became of no force by reason of the complainant's failure to perform his obligations thereunder.

The record shows that the contract was based upon the expected passage of one of two bills then pending in Congress, both of which had made favorable progress, and either of which would, if passed, it was expected, result in the payment of all or most of the claims which were the subject-matter of the contract. It is also

shown that on January 17, 1881, the bill in which there was practically the only hope of procuring the legislation failed of passage, and furthermore that no legislation was obtained during the balance of that Congress. Taking into consideration the fact that two bills are mentioned specifically, by number, in the contract, and that there is nothing in the contract by which the defendant binds himself to continue the prosecution of the claims in the event of the defeat of these bills, before any subsequent Congress, it may well be doubted whether the contract was still binding after March 3, 1881, when the Congress expired without the passage of either bill. It is plain that the complainant could not have compelled the defendant to continue his efforts after the failure of Congress to recognize the claims, or to continue to get in such claims, nor could he have recovered any damages for defendant's failure to further prosecute the claims, or continue getting them in hand. The contract is entirely silent as to the rights and duties of each party in the event of the failure of the bills at that Congress, and in that event a new arrangement would manifestly become necessary. Accordingly we find that when the defeat of the bills at that Congress became certain, January 17, 1881, the fact that a new arrangement must be made if there was to be a continued prosecution of the claims for years to come was instinctively recognized by both parties, and on that very day the complainant and defendant modified the former contract by the complainant's undertaking to furnish the money for the expenses, and by the defendant's undertaking to go on with the work at subsequent Congress. (See pages 32 and 83.) In the nature of the case, after the defeat of the bill on January 17, 1881, there could be no conference between the parties except such as would determine whether the defeat of the bill was to be accepted as a finality, and, if not, to fix the basis upon which the business would be continued in the future. It is manifest that after the defeat of the bill in which the two parties were so much interested that there would be a conference upon the subject as soon as possible, and when the complainant testifies that on that evening he called at the defendant's house and stated that he thought money could be raised to go on with the business he shows that there had already been a conference upon that subject, which must have been the conference testified to by the defendant and the witness Blincoe, as taking place in the afternoon of January 17. That this oral modification of a written contract can be shown by oral evidence is proved by the cases of Teal *vs.* Bilby, 123 U. S., 572; Canal Co. *vs.* Ray, 101 U. S., 502; 1 Pomeroy Eq., Secs. 70, 379, 383; 1 Greenl., Sec. 303.

The evidence shows that the complainant utterly failed to contribute even a proportionate share of the expense, and thus violated the new contract, and freeing the defendant by such default from any liability, at least, for the claims that were secured after January

17, 1881; and that the work of securing the claims and the necessary legislation could not have been carried on at all had it not been for $7,000 or $8,000 unexpectedly earned by the defendant about this time. (Testimony of defendant, p. 53.)

IX.

Although the defendant by his answer submitted to an account in respect to 4,208 cases procured by him prior to March 3, 1883, such submission was coupled with his claim in the answer that he was not liable therefor, because of the difference between the claims contemplated by the contracting parties, and the claims finally allowed under the act of March 3, 1883. It was also coupled with the claim that the contract had expired when the House Bill No. 3981 was defeated January 17, 1881; that a new oral contract had then been made, but which was properly put an end to by reason of the failure of the complainant to perform it on his part. Mason had made a preposterous claim of an interest in all the business which Spalding had built up, up to the time of filing his bill, then eight years after the contract was made. Spalding refused in his answer to render any account of this, but as to the 4,208 claims he submitted to tell the amount of fees received from them, but plainly without intending to acknowledge or submit to any claim therein by the complainant. He paid over to Mason more than the $2,500 received from him, but always making these payments as expressly not in recognition of any contract between them, but merely in recognition of a moral obligation to restore the $2,500 received from him with such additional sums as seemed to the defendant to be right under the circumstances. (See pp. 57, 64, 70.) It was not intended to admit by the submission to making an account that the complainant was entitled to any interest therein, but the account was submitted to for the sole purpose of giving the information to the court upon which a just determination of the rights of the complainant, if any he had in the opinion of the court, could be rightly made.

X.

The case shows that the $2,500 advanced was about expended by January 17, 1881, and even if the court should think that Mason had some equity in the cases procured up to that time it would seem evident that he should have none in the claims procured after that date; certainly without sharing in the expenses of procuring such claims. The expenses after that time and up to March 3, 1883, during which some 700 or 800 claims were procured, were $4,500. (P. 23.) It would seem still more unjust that Mason should not be chargeable with the expenses of procuring the 2,000 claims which were procured after March 3, 1883, and in which the court below

decreed an interest to Mason. The expenses of procuring these claims would fairly be about $6,000, charging such claims with their proportionate share of procuring the 20,000 procured after that time. (See supplemental answer of defendant, p. 23.)

It is manifest from the contract that it was not expected that more than 4,000 claims would be procured, and that it was not expected that more than $2,500 would be needed "to conduct his said business to completion," and, as stated in the bill, that this would be done "within a year." (P. 1.

XI.

The fees collected on claims designated by half numbers. (Pp. 164–166.)

These should not be charged against the defendant, not only for the reasons stated in the preceding paragraph, but also for the following very plain reasons: 1st. They were not on the list described, at the time of the contract, and were not of the class described or in the contemplation of the parties at the time. They were not obtained out of the 7,500 cases then on the list. They were not obtained until after the P. M. G. had made his construction of the law, doing away with the claims that were in the minds of the parties at the time of the contract. Long before that time, in September, 1882, Spalding had distinctly notified Mason that he should no longer lay out his work or employ his capital for his benefit. Certainly when he gave him this notice he was under no obligation to do so. There was then no law for the collection of such claims. The obligations of the first contract were at an end. No suit could have then been maintained against Spalding to compel him to go on and procure legislation to establish valid claims. Whether or not Spalding could have deprived Mason of any then existing rights, he most certainly could then say to Mason, "I will no longer work or expend money for your benefit, and I propose to stop right here." Suppose he had said this, what could Mason have possibly done? He did say it, and did then say, "I propose to no longer be bound by any contract we have made. The first contract is not binding, and you do not choose to be bound by the second contract!" Indeed, Mason now takes the ground that there was no second contract. But however this may be, these half numbered cases were no part of the list described in the decree. Spalding says (p. 147):

"They were cases that were interlined a long time after that book was made, for convenience, and not on the original list. They were put on at different intervals, most likely after 1883. Some of them might have been just prior to 1883, but my judgment is that all were written in there after 1883. They were claims that were developed afterwards, after the register was made; the most of them were written in before I made other registers."

It must be very plain that when they were written in there Spalding did not thereby intend to recognize any rights of Mason, for he had long before, in September, 1882, distinctly repudiated any intention to recognize his interest in any such claims.

It was then entirely proper that he should instruct his clerks, when called upon to make out a list for the court or Auditor, not to include such cases in the list, and should draw a line through them, as he did, to indicate which of the cases should be left out of the list. It would certainly be folly to impute to him any improper motive in doing so. He did not attempt to erase the names, nor attempt to conceal anything in regard to them. He fully explains this in his deposition (p. 34 of deps. before Auditor).

Some $1,600 of these fees are included in the accounting by the Auditor which were not in the list mentioned at all, for the decree is as to a list of about 7,500 claims, and these claims are so numbered as to show that they were listed long after that list was made, for each has an ear mark of a half number. To include half numbers in regular numbers of 7,500 is to have a list of 15,000 claims, and not 7,500 mentioned in the decree. The evidence is conclusive that these claims were not on the list to which the agreement of June referred. It is a manifest error to include them in the account.

Mason therefore could have no interest, according to the express terms of the decree, in the half numbered claims.

XII.

The expense of collecting the fees was twenty per cent. (p. 152, 156, 162, 172).

The Auditor erred in not allowing to Spalding these expenses in collection of fees. He seems to admit that the principle would be correct, but he does not apply it in this case, because: First, it should appear that Mason had knowledge of the expenditures, and second, that Spalding did not keep an accurate account of the expenses that would be applicable to the particular claims that Mason had an interest in.

Now, at the time the contract was made, the universal custom in regard to claims collected of the Government, by means of attorneys, was to send the drafts to the attorneys, or in their care. When this was done there was no difficulty or expense required to collect the fee. The collection was certain, easy, and with no expense whatever, it being very easy to make the claimant pay whatever trifling expense there might be in the way of postage or exchange. This was well understood at the time, and it was entirely lawful. This was in the minds of the parties at the time of the various negotiations or contracts between them. The contracts were all made on this basis.

But afterwards the law was changed in respect to the claims that were finally allowed. It was made unlawful to send the drafts through the care of the attorneys. The drafts were required by law to be sent directly to claimants themselves. Now it is a matter of judical cognizance that this necessarily would add very greatly to the expenses of collection of fees. It would be idle to say that Mason was not well aware of this. He must be held to have known this perfectly well. Having the interest in fees that he claims to have, it would show the greatest carelessness if he should not inquire about it, and thoroughly inform himself about it. He, of course, is bound to know that the law had imposed this burden upon the fees, and that he should share in such burden.

Suppose that a claim is allowed and the draft is sent to the owner, upon which a fee is due of $100. Spalding is entitled to three-fourths of this, and Mason to one-fourth. The claimant refuses to pay any of it. Now, suppose Spalding should say to Mason that he proposes to bring suit for it, and thereupon Mason should say, "I will not be responsible for any expenses in collecting it." Thereupon, Spalding not willing to lose the fee entirely, says, "Well, I shall bring suit for it," and he does so, and thereby incurs an expense of $20. Could Mason in such case claim his entire amount without offering to share the expense? Manifestly not. Probably the court would say, when he refused to do anything further, he would be considered as giving up all right in the fee, as waiving any right in it whatever. But certainly no court would say that in such case he should have his full $25 and Spalding should have only $55, deducting the whole $20 from his share.

If this would be the result in a case where Mason, knowing of the expense necessary to be incurred, expressly refuses to be at any expense, how much more plainly would it be so where he has not expressly refused it? It would seem to be very plain, that if he wished to obtain the benefit of what is obtained, and can only be obtained by incurring expense, he should be held to incur or bear his share of such expense. He could not come into a court of equity and ask equity without offering to do equity.

The legal title to the fee is in Spalding. He alone can bring suit for it. The contract for the fee is in his name. The claim of Mason is an equitable one. As to his share, Spalding is his trustee. If so, the trustee is entitled to all expenses incurred for the benefit of the *cestui que trust*. It may be that he could not make Mason personally responsible for expenses without consulting him, but he could not come in and take the benefit without the burden with it. He certainly could not ask to have all the benefit at the cost of Spalding.

Suppose the parties should be regarded as tenants in common or partners as to the fee. Where one tenant in common, or one partner necessarily expends money for the preservation of the property

itself, he can even maintain a suit against the other tenant in common or partner for money so expended by him. But our claim does not go to so great an extent. It is only that, when the other party comes into a court of equity, before he can get the benefit of what has cost the other party money or expense, he can not get it without taking the burden with it, and that this is so even though the party so claiming has expressly refused to become responsible for any part of the expense.

But the other objection of the Auditor is, that Spalding has not kept a separate account of the expenses pertaining to the claims that Mason has an interest in.

But Spalding shows how this would have been impossible. Take for example the rent of the office, which he says had to be kept for the express purpose of collecting fees. How would it be possible to keep a separate account of this? Take the clerk hire or the printing of circulars. This difficulty and impossibility is fully explained by Spalding in his testimony, and a little reflection will show its reasonableness. Besides this, after September 1, 1882, Spalding denied the right of Mason altogether, and denied that he was at all accountable to him for any part of the fees.

"When a mortgagee or tenant in common, in possession, is called upon to account for the rents and profits of the premises, he is chargeable with the net amount of such rents and profits only after allowing the necessary reparations upon the premises and the taxes and assessments charged thereon which have been paid by him out of such rents."

This is different from a case where one attempts to charge his co-tenant, in an action of assumsit upon an implied promise to pay for repairs which he had never authorized; and where, from the circumstances of the case, no such implication could arise. (Hannon *vs.* Osborn, 4th Paige, 343.)

This is upon the general equitable principle, that one who seeks equity must do equity, and that where a party comes into a court of chancery to demand rents and profits of a *bona fide* occupant of land, he must pay for meliorations. (16 Am. Dec., 443.)

Even in an action in trespass for mesne profits, what has been expended for repairs will be allowed as an equitable set off against the claim. (Murray *vs* Gouverneur, 2 John. Cases, 438; 1 Am. Dec., 180.) In such cases there could be no previous notice or request. (See also Moore *vs* Cable, 1 J. Ch., 385.)

The rule for a trustee would not be to inquire of the *cestui que trust* what should be done, but to use his own best judgment, and if reasonable the court will allow what he expends, without reference to whether he gave notice or not. So would it be with a partner. Upon a bill for an account he will be allowed for all proper expenses made in good faith.

It is manifest that the change of the law and the determined ef-

fort of the Postmaster-General to prevent the payment of the fees, rendered the collection of the fees to any extent impossible without an outlay from such fees of large sums to secure guarantees and carry on the great correspondence in order to reduce the loss of fees to the mimimum. All these facts are in the Record, and the evidence is clear that the average outlay approximated twenty per cent. of the amount of fees expended for this indispensable purpose. When in order to collect $100 it was necessary to make an outlay of $20, it is manifest that the fee received by the defendant was $80 and not $100. The Auditor's report in holding that the defendant received $100 in such a case is a manifest error. Nothing can be clearer than that every dollar expended for this purpose constituted a reduction of the fee by so much.

XIII.

The court erred in allowing interest from August 9, 1887, up to the time the alleged amount was ascertained to be due, which was a period of two years and five months.

Where there is an unliquidated debt interest can not be allowed thereon, at least until there is a proper demand, and this case shows that no proper demand was made at the beginning of the trial, for it was for a very much larger amount than the court ascertained to be due, and it was of such a preposterous nature that it could not possibly be complied with. Interest can not be recovered except from contract to pay it, express or implied, by usage of trade or special circumstance or otherwise. Calton *vs.* Bragg, 15 East., 223.

In Clark *vs.* Dutton, 69 Ill., 521, the court, quoting from Bouvier, says, speaking of interest:

"A debt is liquidated when it is certain what is due, and how much is due, *cum certum est an et quantum debetur:* for although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated. An unliquidated debt is one which one of the parties can not alone render certain."

"Where a party's right to compensation under a contract is doubtful, and is contested on reasonable grounds, and the amount due him requires to be determined by suit, interest will not be allowed for the time preceding such determination of the right of recovery and the amount due."

Shipman *vs.* The State, 44 Wis., 458 (Syllabus).
See also Gilman *vs.* Vaughan, 44 Wis., 646.

"Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or implied; and the case must be a very strong one when it is between partners to warrant the allowance without express agreement to that effect."

Sweeny *vs.* Neely, 53 Mich., at p. 424.

In Prentice *vs.* Elliott, 72 Ga., at p. 157, the court say:

"The parties had not ascertained the amount due plaintiff, and this bill was filed for that purpose, and the amount due plaintiff was never ascertained until the finding of the jury in this case. Their finding was *less than the amount claimed by plaintiff;* and it then became ascertained and fixed, and from that time interest became an incident of the debt, *not before*, so that the finding by the jury of interest before that time was wrong."

"An unliquidated account would not at common law *prima facie* bear interest. [1 Bibb., 325.] Interest is sometimes allowed in damages where the debtor is justly chargeable with delinquency; but never where the delay is the result of the mere failure of the creditor to press the collection of his claim. [3 J. J. Marsh., 688."]

11 Bush., 49, Ad. Ex. Co. *vs.* Milton (Syllabus.)

"No interest for either past or future time can be calculated or allowed in a decree on a bill for an account or demand before unliquidated."

Neal *vs.* Keel's Exrs., 4 T. B. Monroe, 163 (Syllabus).

"Interest is not payable upon balances as between partners except by some agreement or understanding."

Gage *vs.* Parmelee, 87 Ill., 330 (Syllabus).

In Admr. *vs.* Fort Plain Bank, 36 N. Y., 266, court say:

"It was said in Van Rensselaer *vs.* Jewett, 56 Denio, 143: When one is sued upon a *quantum meruit* for work and services, as there has been no special agreement, he does not know how much will balance the debt. The amount is quite uncertain, and it requires a judgment or verdict to render it certain. Hence the debtor is not so in default in not paying the debt that he should be chargeable with interest."

"Interest on unliquidated demand.—When a claim is uncertain and unliquidated and the amount can not be estimated on the face of the contract, interest on the amount found due by process of law must not be allowed."

Brady *vs.* Wilcoxsen, 4 Cal., 239 (Syllabus).

"This court has repeatedly held that when accounts were unliquidated and disputed between the parties, interest ought not to be allowed."

Kerr & Co., *vs.* Lane, 1 Wash., 172.
McConnico *vs.* Curzen, 2 Call., 358.

"In Skipwith *vs.* Church, 2 Call., 253, interest upon rent was refused where the amount was so uncertain that the lessors did not

venture to distrain. Where an attorney-at-law had lost debts by negligence he was charged with the principle of the debts, but not with interest. [Rootes *vs.* Stone, 2 Leigh, 650.] A claim was presented to the solicitor, which was refused; upon an appeal to the court it was allowed. Although the claim was just, it was doubtful; and it was held that in such case the court ought not to allow interest. [Auditor *vs.* Dugger, 3 Leigh, 241.] These cases show that the court ought not to allow interest when the claim, though just, is doubtful, or where the amount is unliquidated and uncertain." [Stearns *vs.* Moore, 24 Grat., 494]."

It appears from the report of the Auditor (pp. 116, 117) that $4,756.90 of the fees in which Mason is allowed to share had not been received August 9, 1887. They were paid at different times from that time until as late as April, 1889, so that no such balance was due at that time. Interest, therefore, on the balance, finally found due from August 9, 1887, is plainly wrong.

XIV.

But the entire bill of the complainant should be dismissed.

The decree of the court below appears to be founded on a complete misconception of the facts and the law.

This is not, perhaps, strange, because the character and incidents of the controversy to enforce the readjustment of the compensation of postmasters, which has gone on since 1871 and is now in progress, are without parallel.

It will be plain to this court, for the subject has already been before this court that by operation of the act of July 1, 1864, which provided for the adjustment of the compensation of all postmasters for two years in advance on the basis of the average commissions for the two years before, that such adjustments inevitably produced deficiencies in the compensation of postmasters when compared with the commissions provided for by the act of 1854 in respect to all cases in which the receipts increased during the term covered by such adjustment, and that there could be no remedy for such deficiencies while the act of 1864 remained in force except by a readjustment of such deficient compensation. In the nature of the case, after the readjustment act of 1866 became a law, there was but one possible ground for a contention so long as these deficiencies existed, and that was for a readjustment of the deficient salaries. This only possible contention the defendant carried on from 1871 to 1883.

When the mandate of March 3, 1883, was enacted it seems that the debt which it was intended to settle was found to be very large, amounting, no doubt, to $3,000,000. The department had resisted the payment of this debt for years, and after the act of 1883 was

passed the alternative was presented to the Postmaster-General of the adjustment and the payment of this great debt or in some way to avoid its payment. It seems there was no way by which its payment could be avoided except to proceed colorably with reviews of the original adjustments made by the Postmaster-General under the act of July 1, 1864, and so fix the salary in any given term by the amount of the commissions in the prior term. To adopt this revision, in denial of the readjustments provided for, would of necessity have defeated the payment of anything to any postmaster had the Postmaster-General originally complied literally with the act of 1864 without exercising any discretionary authority given him by that act, while at the same time it would have defeated the payment of any deficiencies which the execution of the act of 1864 of necessity produced.

This method was adopted, and while it defeated the payment of the deficiences it produced unlooked-for results, because the Postmaster-General originally and systematically decreased the salary for the succeding term in cases where the receipts fell off towards the end of the preceding term, under his discretionary authority, so that the salary for the succeeding term corresponded approximately with the decreased receipts, In every such case the method adopted increased the diminished salary, so that it exceeded the commissions in the term of the decreased receipts. These claims were not only new and unlooked-for and unthought-of, but they were claims opposed to those which the defendant had prosecuted and were without warrant of law. It was for this reason that the Postmaster-General was compelled to secure by the act of August 4, 1886, authority for allowing such claims and his immunity for allowing such claims and for disallowing the claims under the acts of 1866 and 1883.

The complainant manifestly could by no possibility have any right to fees upon such claims under his contract of June 3, 1880.

The defendant, at his own cost, has carried on since 1871 a great contention to enforce the adjustment and payment of the deficiencies in postmasters' salaries, and this great contention is in progress to-day. This contention is naturally divided into three sections. First is that between 1871 and January, 1881, when he was defeated. The second is that between 1881 and March 3, 1883, when he secured the mandate of that date to enforce his contention. The third is the contest to enforce the mandate of 1883. In this he was defeated by the Postmaster-General so far as that officer had the power to defeat him by the adoption of reviews of adjustments under the act of 1864, which reviews denied the readjustments provided for by the acts of 1866 and 1883. The aid the defendant has received in these great contentions is confined to the sum of $2,500, which he received in installments of the complainant between July, 1880, and February, 1881, and for this he has repaid to the com-

plainant $2,670. It is true that when the $2,500 was paid to defendant by the complainant, with the exception of the last payment, it was under circumstances such that both believed that the contest would be successfully ended within about a year and that $2,500 was a sufficient sum to accomplish this. And both the complainant and defendant at that time expected large profits out of it. When the complainant failed to comply with his contract to furnish the necessary pecuniary means for the new contest which was necessary by the failure of January, 1881, the defendant knew that if he succeeded he would have ample means to make a liberal return to the complainant for the $2,500 he had received from him. And when in 1884 to 1887 he had failed to enforce his own contention but had profited by the collection of fees from claims allowed by the Postmaster-General by reviewing the decreased salaries allowed on decreased receipts on the basis of the larger receipts of the term prior, he still had some means of dealing with liberality with the complainant, and at this time he was threatened by the complainant with a complete destruction of his business by dragging him into court and compelling him to render an account of about 25,000 claims and by defeating wholly the further collection of fees by means of the peculiar condition in which the business was then in.

In all these transactions there is no legal liability on the part of the defendant to the complainant, and the defendant's offer to him is no admission of legal liability.

The decree of the court below should be reversed with directions to dismiss the petition with costs.

W. WILLOUGHBY,
Attorney for the Appellants.

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Supreme Court of the United States.

HARVEY SPALDING *et al*, Appellants,
vs.
GEORGE MASON, Appellee.
No. 313.

ADDITIONAL BRIEF OF APPELLANTS.

I.

The answer says that Spalding in September, 1882, promised to return to Mason the $2,500 and if successful that he would make up the amount to him of $10,000 and that he has returned the $2,500 and made payments to him on that basis, and he has always been willing to be bound by this.

With this view he further says in his answer, "Whilst as regards that fact of which he may have a right to account *for the purpose* of recovering the $10,000 above mentioned or to recover any other amount to which he may be entitled—that is the part made up by the 4,208 cases aforesaid—this defendant says that no account thereof has been demanded of him by the complainant." R., p. 19.

In submitting then to an account in regard to the 4,208 cases he does it only "for the purpose" of satisfying his liability on the basis of this offer. But the bill is not founded upon this, and even if this submission should be regarded as continuing the offer it was not accepted, but the answer was excepted to because this was not sufficient, and the court required full answers.

The court did not act upon this but repudiated it, and required an account of 7,500 claims, and the complainant has always insisted upon this, not on the ground of this submission in the answers, but on entirely different grounds.

Even if the court should think that the defendant admitted his legal liability upon the facts stated by him it would not hold him to this, but it will decide the legal rights of the parties upon the facts established in the case without reference to what either party may have considered to be the law.

II

The contract set out in the bill of complainant (R., pp. 2, 3) was acted on by the parties from its date, June 3, 1880, up to the 17th of January, 1881, when the legislation in Congress, which the parties were seeking, and without which they could do nothing with their claims, was defeated. At that time an additional contract was made between the parties relating to the same subject-matter but it was not reduced to writing. The terms of the contract were that Spalding should renew his efforts to secure the necessary legislation and to continue gathering in claims and that Mason should furnish the money to meet the necessary expenses to be incurred.

For the evidence, in behalf of appellant establishing the existence of this additional contract, see Record, last paragraph of page 31 and part of page 32; also see page 82, commencing with the last paragraph and pages 83 and 87.

To this evidence the appellee offers a broad denial found in Record, page 92.

We respectfully submit that the evidence establishes the existence of the additional contract and becomes part and parcel of the original contract. The two must be taken together as one contract.

This additional contract being established then we have the case of a party who has refused to carry out his part of a contract while coming into an equity court and asking its aid to compel another to fulfil his part of the same contract.

Equity Courts are established for no such purpose.

"He who seeks equity must do equity" is one of the oldest maxims of equity courts. The only limitations are, that the equity which he is to do must arise out of the same subject-matter from which he seeks to obtain equity.

Again the appellee is asking the court to ignore another of its maxims, to wit: "He who comes into equity must do so with clean hands." This maxim is also limited like the other to the same subject-matter out of which the appellee in this case claims equitable relief; and this is sometimes expressed as follows: "The dirt upon his hands must be his bad conduct *in the transaction complained of.*" The appellee makes no effort to clean his hands by doing equity or offering to do it, but denying the existence of the contract of January 17, 1880, he sought by his bill to take out of the appellant's hands all his business in a way that would have destroyed it, and as the result shows, a business in which his interest was limited, if he had any interest at all, to a one-quarter of a one-third.

Interest.

(See Brief, page 27.)

The contract set out in the bill of complaint calls for no interest. No prayer for interest is found in the bill.

The reason for all this is found in the provision of the contract (R., p. 2, last Par.) to the effect that each party should collect his own proportional share of the claims and thus collect his own fees directly from the claimants themselves.

The 13th paragraph of the answer (R., p. 19), alleges that in June 1880, the appellant offered to transfer to appellee one-fourth of all the powers of attorney and contracts for fees then in hand and that appellee refused to receive them and never made thereafter any demand for them; and there is in the record no denial of those allegations in the answer.

We therefore have a case where each party to the contract in question was to do his own share of the collecting of the claims and thus to collect his own fees and simply to account to the other for any balances due from one to the other by reason of the one having collected somewhat in excess of his share, as an accurate division of the proceeds of the claims could not be made by division of the powers of attorney and contracts, so that the one in the end would get just one-fourth of the fees and the other three-fourths.

One of the parties refuses to take from the other the necessary assignments of contracts and powers of attorney to enable him to perform in that regard his part of the contract, but leaves the other to perform his work for him, refuses to pay his share of the expenses of collecting (for evidence as to expense of collection see Rec., pp. 152, 156, 162, 172) and then demands interest on his share of the fees to commence running on the whole before two-thirds of them had been collected, and the court below accedes to his demand.

The mere statement of this point of the case is its best refutation.

W. WILLOUGHBY,
Counsel for Appellant.

Errors on pp 2 & 3

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 313.

HARVEY SPALDING *et al.*,
Appellants,
vs.
GEORGE MASON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

The controversy in this case grew out of the following circumstances:

About the first of June, 1880, appellant approached the appellee with the following proposition in writing (Record, p. 43):

EXHIBIT A. H., No. 1.

"The Act June 12, 1866, provided for the increase of pay as often as the commissions increased ten per cent. of all postmasters whose pay was less than $2,000 per year. The Postmaster-General did not execute this law.

"The Senate has passed a bill (Senate 903) and the House Com. on P. O. and P. R. have unanimously reported a bill for same purpose; that is, for the execution of this law.

"The debt, a settlement of which is to be provided by these means is $2,000,000, divided between 8 or 10 thousand claimants. I have in hand between 16 and 17 hundred of these claims. I received last week 71 and I have all the data necessary to secure 1,500 more in two or three months and 1,000 in addition within the year. I can easily control 4,000 of the claims, in value about $1,000,000, upon agreed fees equal to 25 per cent. Those I have in hand in value about $500,000, and the fees agreed upon are 25 per cent.

"I propose to sell absolutely one-fourth of all the fees of the claims in hand, and one-fourth of all I can bargain for hereafter, (and no case to be taken for less than 25 per cent. fee,) for the sum of $2,500. The purchaser shall be wholly free from all expense of conducting the business, and shall receive free of all charges one-fourth of each and every fee on each and every claim now in hand or hereafter secured by me.

"Pending the prosecution and collection of these claims, I will substitute the purchaser as attorney, and assign the fees in one-third of the cases in hand and one-third of cases secured each week or each month—said cases to be safely kept by the purchaser in some secure place till ready for settlement.

"Payment of the $2,500 may be made as follows: $500, cash.

"$1,000 in notes of $250 each, payable in one, two, three, and four months.

"$1,000 in endorsed notes of $250 each, payable in five, six, seven, and eight months.

"In case of any default of payment the one-fourth interest shall be reduced proportionally."

The appellee accepted the proposition and the terms of it were embodied in the following (p. 2):

CONTRACT.

"Harvey Spalding and George Mason, both of Washington city, in the District of Columbia, mutally covenant and agree with each other as follows:

"Harvey Spalding, having for several years been engaged in the prosecution of claims of postmasters and late postmasters for adjustment of their salaries in conformity to section 8 of the act of June 12, 1866, and having a large number of such claims now in hand, to wit, seventeen hundred or thereabouts, and being now engaged in the prosecution of said claims, and in securing for prosecution other similar claims, of which he expects to secure in the aggregate, including those in hand, *about* 4,000 in number, *more or less*, upon agreed fees equal to 25 per cent. of the amount, which shall be collected in each case; and having secured the passage by the Senate of Senate bill 903, this Congress, and the favorable report of House bill No. 3981 by the proper committee of the House of Representatives, which bills propose a basis for the settlement of the claims herein referred to, and the substance of which he expects to be enacted into law, and being in need of funds to conduct his said business to completion, hereby agrees to sell to said George Mason one-fourth of all his interest in said claims now in hand, and all that he may hereafter secure, and one-fourth of all his fees therein, free from all charges for expense of prosecuting said claims to collection thereof, for the sum of twenty-five hundred dollars.

"The said interest and share in said claims and fees shall vest in said Mason on payment by him of said purchase-money, and a *pro rata* proportion of said interest and share shall vest in said Mason on payment of each installment of said purchase-money as hereinafter provided. The said Mason shall pay the said purchase-money to the said Spalding as follows:

"He shall pay the sum of $100 on signing this contract and a further sum of $100 on or before the 12th of June, instant. He shall pay a further sum of $300 on or before the 5th day of July, prox., and a further sum of $750 on

or before the 5th day of October next. He shall pay a further sum of $600 on or before the 5th day of November next, and a final payment of $650 on or before the 5th day of December next.

"It is further agreed that a due proportion of all the powers of attorney and contracts for fees to cover the interest of said Mason shall be transferred to him by said Spalding by proper indorsements of substitution on the powers of attorneys and assignments, indorsed upon the contracts, and said fees may be collected by the said Mason, and an account thereof shall be kept, and all the fees collected by the said Spalding shall be accounted for, and settlements shall be made from time to time as collections are made, and a division thereof shall be made, three-fourths going to said Spalding and one-fourth to said Mason. The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can and to make contracts for fees equal to 25 per cent. of the collections and to subject the whole to be shared, together with those in hand, by said George Mason for the consideration hereinbefore specified.

"And the said George Mason agrees and binds himself to pay over to the said Harvey Spalding the whole amount of said sum of twenty-five hundred dollars within the time and in installments as hereinbefore specified, unless he shall elect to pay the whole of said sum within a shorter period than the time named.

"In witness whereof the said parties have hereunto set their hands and seals this 3d day of June, A. D. 1880.

"HARVEY SPALDING. [SEAL.]
"GEORGE MASON. [SEAL.]"

Upon which contract are the following endorsements:

"Received Washington, D. C., June 23rd, 1880, one hundred dollars on this contract. HARVEY SPALDING."

"Washington, D. C., Febr'y 21st, 1881. I hereby acknowledge to have received the am't in full agreed upon to be paid me in this contract by George Mason, viz: Twenty-five hundred dollars. HARVEY SPALDING."

On the 3d day of March, 1883, a bill substantially the same as House Bill 3981, mentioned in the contract, became a law (p. 11), and the appellant prosecuted and obtained settlement of a large number of claims of postmasters for whose benefit the act was passed.

Appropriations were made in the years 1884, 1885 and 1886 for payment of these claims, amounting in the aggregate to upwards of $600,000 (p. 5), and subsequently other large appropriations were made for the same purpose.

None of the fee contracts were transferred to the appellee, nor was he substituted as attorney in any of the cases as provided in the contract, and having reason to believe that the appellant had collected a considerable amount of fees in which he was entitled to one-fourth, according to the terms of the agreement, he requested a settlement of the appellant by letter dated August 9, 1887 (p. 58).

The appellant replied on the following day by letter, as follows:

"You are aware, because the matter has been repeatedly referred to, that the claims referred to in the memorandum which I gave you, in consideration of the $2,500 I received from you, having reference to the bill then pending in Congress, which afterward failed, have scarcely been touched upon, so far as any allowances have been made and so far as any fees have been received" (p. 60).

A lengthy correspondence ensued (pp. 60 to 77), resulting in a refusal by the appellant to render any account of the fees to the appellee, or to settle by arbitration, and, thereupon, the appellee filed his bill praying for a discovery and accounting.

The answer sets up two matters of defense:

The first was in substance that at the time the contract was made appellant had made a list of about 7,500 names of persons whom he supposed would be entitled to additional

compensation under the proposed legislation, according to his understanding of its meaning, but that by the subsequent rulings of the Postmaster-General and the courts a construction was given to the law different from the one in contemplation of the parties when the contract was made, and that as a result claims had been filed by him for only 4,208 of the persons in the list of 7,500; that by reason of this construction of the law many persons became entitled to a benefit under it who had never been thought of as possible claimants at the time the contract was made, and that he had prosecuted claims of "about 20,000 postmasters other than any who were upon his list in June, 1880" (p. 19).

He therefore denied that the contract between him and the appellee covered any cases not embraced in the alleged list of about 7,500 claimants (pp. 15, 16, 18, and 19). But he submitted to an account in regard to the 4,208 cases embraced in said list (p. 20). He also admitted the receipt of fees amounting to $36,169.75 in this class of cases.

The second ground of defense alleged in the answer was that a subsequent verbal promise was made to him by the appellee to pay a share of the expenses of prosecuting the appellant's business, which promise, it is alleged, the appellee failed to keep, and by reason thereof the appellant averred he was released from his contract mentioned in the bill (pp. 16 and 17).

Issue was joined upon the answer and testimony was taken upon the two foregoing matters of defense set up in the answer, and upon the hearing, at a special term of the court below, a decree was entered on the 23d day of March, 1888 (pp. 108 and 109), adjudging that the complainant (the appellee) was entitled to recover from the defendant (the appellant) one-fourth of each and every fee received by the latter, or which might thereafter be received by him,

upon claims included in the list of about 7,500 mentioned in the defendant's answer, and that the complainant was not chargeable with any part of the expenses of the business of securing and prosecuting said claims. It was further decreed that the complainant is not entitled to any part of the fee or fees received by the defendant, or that might thereafter be received by him, from any claimant not embraced in said list of 7,500 claimants, and an account was ordered to be stated accordingly by the Auditor of the court.

At that time an appeal lay by either party from such a decree to the general term of the court below, and the complainant, Mason, the appellee here, appealed from that decree to the court in general term, where he assigned as error the holding of the special term that the contract should be construed to include only the claims mentioned in the alleged list of 7,500; but the defendant, Spalding, the appellant here, did not appeal from that decree, and at the hearing of the case in general term, upon the said appeal of complainant, insisted upon an affirmance of that decree, and it was affirmed.

After the said affirmance the case went to the Auditor, pursuant to the aforesaid decree of the special term, and his report is found commencing on page 110 of the record. The balance found by that report due appellee is $13,669.11, with interest. Exceptions were filed to the report by both parties, but as those filed by appellee are not in question here they need not be stated.

On the 30th day of September, 1889, the special term of the court below entered a decree overruling all the exceptions of both parties to the Auditor's report, and decreeing in accordance therewith. From this decree both parties appealed to the general term of the court below, which sustained the fifth exception of the appellant, Spalding, to the report, relating to the question of interest, and modified the

decree of the special term as to the dates from which interest should run, and overruled all other exceptions to the report, and affirmed the decree of the special term as modified (p. 179). From this decree both parties appealed to this Court; but, because of a change of circumstances not necessary to set forth here, occurring since the decree below, the appellee, Mason, has dismissed his appeal and insists upon an affirmance of the decree.

ARGUMENT.

In this condition of the record it is respectfully submitted that the correctness of the decree made by the special term of the court below on the 23d day of March, 1888, adjudicating the principles of the cause and referring it to the Auditor to state an account, cannot be called in question. If the appellant had not been satisfied with that decree he should have appealed from it, so that the principles upon which the account should be stated might be settled by the general term. By failing to question the correctness of that decree when he had an opportunity to do so and asking an affirmance of it by the general term, he is forever concluded from assailing it as erroneous.

The opinion of the Court in general term is contained in the record, pages 90 to 108. At pages 107 and 108 the Court says:

"The court below found against the defendant on this part of his answer. He alleges that the expenses were very heavy, amounting to something like $60,000; that the complainant was liable to pay one-half of these expenses. But the court below found against the position of the defendant in this particular; but found for the defendant as to the construction in regard to the class of claims embraced in the contract.

From this decree of the court below the complainant ap-

pealed. The defendant did not appeal from the decree against him in reference to the costs of the prosecution of these claims. No cross-bill was filed.

While this matter has been the subject of considerable argument between counsel orally and in their briefs, it is conceded by counsel for the defendant, the appellee, that if the court affirms the decree of the court below as to the findings upon the question of what is embraced within the contract of the parties, as to that part of it which is against the complainant and from which he appeals, if they affirm that, then the court must affirm the decree *in toto*, inasmuch as the defendant has not appealed from that part of the decree which is against himself. He only claims that that part of the decree might be modified and reversed upon the appeal of the defendant.

Inasmuch, then, as .we affirm the decree of the court below, from which the complainant appeals, the decree will be necessarily affirmed *in toto*. We cannot recognize the right of the defendant to have this matter reviewed when it was not appealed. There is nothing for us to decide."

The opinion of the court in this regard is in accord with the uniform decisions of this court.

Canal Co. *vs.* Gordon, 6 Wal., p. 568.
London *vs.* Taxing District, 104 U. S., p. 774.

But if that decree were open to review by this Court upon this appeal it would be found clearly right.

The only point decided by that decree adversely to the appellant (Spalding) was in respect to the

EXPENSES IN OBTAINING AND PROSECUTING THE CLAIMS.

The contract between the parties provides that appellee's share of the fees is to be "*free from all charges for expense of prosecuting said claims to collection thereof*" (p. 2). And in appellant's proposal to sell he says: "*The purchaser shall be wholly free from all expense of conducting the business, and shall receive, free of all charges, one-fourth of each and every*

fee" (p. 44). He claims the right to these expenses, in his answer, by virtue of an alleged subsequent oral contract.

The burden of proof was upon the defendant (appellant) to prove such contract made upon a new consideration. No new consideration is proved. The contract (pp. 2 and 3) shows that the defendant had been giving attention to promoting the legislation without which the claims were worthless. He agreed by the contract to obtain all the claims he could and prosecute them. A proper prosecution involved all reasonable efforts to secure the necessary legislation. This he was bound to do by the contract. Under its terms he had no right to cease his efforts because he was discouraged. It was his duty to continue all reasonable efforts, not only to obtain the claims, but to obtain the necessary legislation to make them valuable. It was less than eight months from the date of the contract to the time when the House bill mentioned in it was defeated. There is nothing in the contract to indicate that his efforts should cease on the failure of either or both of the bills mentioned in the contract. On the contrary, it was his duty to continue his efforts for a reasonable time, and certainly as long as the expectation of the passage of a law seemed reasonable. It would have been very unreasonable for defendant to have abandoned further effort on the 17th of January, 1881, when the bill had been defeated by only a few votes, and had he done so complainant could have recovered back at least the $2,500 with interest. Under such circumstances there was no new consideration to support a modification of the original contract.

Nor does the statement of what occurred at that time, as set forth either in the answer or evidence of the defendant, amount to or purport to be a modification of the original contract. Giving the language of defendant in his answer and in the evidence its fullest scope and

broadest meaning, it amounts to no more than a voluntary promise on the part of the complainant to advance money to pay or aid in paying necessary expenses, if defendant would continue the efforts; which by the contract he was already bound to do; and if, under such circumstances, he had advanced any money he would have been entitled to receive it back out of defendant's share of the fees, and the same would not have amounted to a modification of the contract in any particular. In his answer (p. 17) the defendant, referring to this alleged agreement on the part of complainant to advance money, says: "Relying upon this contract, this defendant proceeded to promote further legislation in the Forty-seventh Congress and to secure other clients, *as had been agreed in June, 1880*," showing that the defendant did not understand that by the alleged new agreement he undertook to do more than he was bound to do under the pre-existing contract. His testimony (p. 32) does not support his answers as to a new contract. The answer avers a promise that the appellee "*would share in all the expenses*" of the further prosecution of the business. In his testimony he says that the appellee said "*he would stand by me and furnish whatever money might be needed for the expenses of the business whenever it should be needed.*" And his witness, Mrs. Blinco, repeats the alleged conversation in almost identically the same words (p. 83).

The appellee denies that he agreed to pay the whole or a share of the appellant's expenses in prosecuting these claims. He says he may have told appellant that he would aid him in raising money to pay the expenses, although he has no recollection of having done so (pp. 91–2). The last payment on the $2,500 mentioned in the contract was made February 21, 1881 (p. 92), on which date an acknowledgment was endorsed upon the contract of the payment of the whole $2,500 (p. 3). If this contract had been abandoned and a

new one made, or if there had been a modification of it in the important particular alleged, it would have been natural and reasonable that it should have been mentioned in this endorsement or in some other written memorandum.

It is admitted by the appellant that he received advances of money from appellee other than the $2,500 to use in paying the expenses of his business, a part of which he admits was never repaid, but the amount of such advances, as well as the amounts repaid, are matters of dispute between the parties (pp. 32, 62, 63, 51).

EXCEPTIONS TO AUDITOR'S REPORT.

The appellant's exceptions to the Auditor's report are as follows:

"1. That he is charged with certain claims which were not secured by himself from claimants, but were sent to him for prosecution by and on behalf of certain attorneys of such claimants.

"2. That he is charged with any of the claims referred to in the report and testimony as indicated in his book by half numbers.

"3. That he is charged with $207.48 of the fee paid by George Phillips.

"4. That he is not allowed twenty, or some other, per cent., or some amount in gross, for expenses in collecting fees.

"5. That he has been charged with interest on monthly balances in the manner set forth in the report."

These exceptions do not controvert the facts as found in the Auditor's report. Therefore the only questions arising upon them is whether the Auditor's conclusions are right upon the facts as he has found and stated them in his report. If the appellant had claimed that the Auditor found the facts contrary to the evidence he should have made that a ground of exception and referred to the evidence showing

the error. The exceptions are therefore too vague and general to require the Court to examine them, or either of them.

Harding *vs.* Handy, 11 Wheat., 103, 126–7.
Brockett *vs.* Brockett, 3 How., 691.
Story *vs.* Livingston, 13 Pet., 359, 366.
McMicken *vs.* Perin, 18 How., 507.

But if the Court should undertake to examine the exceptions and search the record to discover upon what they are based it will be found that none of them are well taken, and that, applying to them the principles long since established by this Court, it cannot disturb the decree founded upon this report.

The findings of the Auditor are based upon conflicting evidence, and have been examined and approved by both the special and general terms of the court below which heard the case on two different occasions. In such case this Court will not reverse unless some obvious error has intervened in the application of the law, or there is some clear and plain mistake in the consideration of the evidence.

Tilghman *vs.* Proctor, 125 U. S., 136; 149–50.
Evans *vs.* State Bank, 141 U. S., 107.
Crawford *vs.* Neal, 144 U. S., 585, 596, 601.
Furber *vs.* Ferris, 145 U. S., 132.

In Crawford *vs.* Neal, *supra*, in which the master's report had been approved by the court below, this Court said: "Clearly, then, they (the findings of the master), are to be taken as presumably correct, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." (See p. 596 of the report.)

And again, on page 601, the Court further says: "We have

patiently examined the evidence contained in the record, and it is impossible for us to reverse the decree for error or mistake in the conclusions of the master and the court, depending, as they do, upon the weighing of conflicting testimony, and entitled, as they are, to every reasonable presumption in their favor."

Applying this principle to the report and exceptions in this case the same conclusion is inevitable, as will appear from the examination of the exceptions.

Defendant's First Exception

relates to certain cases which he obtained through other attorneys, Mr. Strong and Mr. Kuntz, dividing with them the fee of twenty-five per cent., giving them one-third and retaining two-thirds for himself. The fees received by the defendant in these cases amount to $5,176.80.

Because he procured these claims through the agency of third persons and not directly from the claimants, he insists that they are not covered by his contract with complainant.

This exception is too frivolous for extended argument. It is conclusively answered by the familiar maxim: "*Qui facit per alium facit per se.*"

It is not disputed that these claims come within the class of claims covered by the contract, to wit, the list of about 7,500 claims referred to in the decree pursuant to which the account was stated. The language of the contract is that: "*The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can, and to make contracts for fees equal to twenty-five per cent. of the collections, and to subject the whole to be shared, together with those in hand by the said George Mason, for the consideration hereinbefore specified.*"

The defendant was employed by all these claimants. He held a power of attorney and contract to pay him twenty-five per cent. of the recovery for his services from each of them. He appeared as their attorney of record, and obtained the allowance and payment of the claims, and collected the full fee of twenty-five per cent. According to the

letter of his contract with complainant he might be held to account in this case for one-quarter of the twenty-five per cent., but, accepting the defendant's statement that he could not secure these cases except through the agency of third parties, to whom he had to pay one-third of the fee in each case, complainant has insisted only upon his share of the remaining two-thirds, and the account is so stated. (Rec., p. 111.)

If ever there was any ground for controversy over the fees received in these Strong and Kuntz cases the defendant is concluded by his answer to the bill.

These cases are part of the 4,208 cases which he says in the eleventh paragraph of his answer he procured for prosecution from the Mason list (so called), and by the fifteenth paragraph of the answer he submits to an accounting in regard to these 4,208 cases.

Defendant's Second Exception

relates to certain cases, sixty-seven in all, designated by half numbers upon the book in which was listed the names of about 7,500 supposed claimants, in respect to which the account was ordered by the Court, and from which defendant realized fees amounting to $1,678.48.

These names, the defendant says, were not upon this list at the time he made the contract with complainant, but were written in afterwards; the exact time he cannot give. He contends that the cases covered by the contract were a specific 7,500 possible claimants, which had been listed at the date of the contract, and that the few cases added to the list afterwards, and designated by fractional numbers, are not within the contract.

It will be observed, on looking into the testimony, that this list of about 7,500 names was only partially made up at the date of the contract with complainant.

See testimony taken by Examiner Harper:

Harvey Spalding, pp. 28.
James H. Spalding, pp. 79.
Laura A. Blinco, pp. 84.

It, therefore, could not have been this particular list of names that formed the subject-matter of the contract.

The Court has defined the subject-matter of the contract in its opinion in this case reported in Vol. 18, D. C. Reports, pages 125 *et seq.* (Record, pp. 105 and 106.)

The Court, referring to the rights or supposed rights of persons under the act of 1866, divides claimants into two classes, viz: (1) Those supposed to be entitled to additional compensation according to the construction of the law as understood by the parties at the time of making the contract. (2) Those actually entitled according to the different construction of the law adopted by the Department and approved by Congress and the Supreme Court of the United States.

The Court held that the contract embraced only claims in the first class. Now, to which class of claims do the ones in question belong? Were they cases procured and listed with reference to the old, or erroneous, construction, or in reference to the new, or correct, construction?

This question is clearly answered by the defendant and James H. Spalding.

The former says, at page 147 of the record, testimony taken before the Auditor, that these names where interlined upon the old book before the new lists were commenced.

The latter says, page 80 of the record, that the new lists were commenced in July, 1883, after the decision rendered by the Postmaster-General giving the "new construction" to the law.

Again as to this contention the defendant is also concluded by his answer. These cases were included in the 4,208 claims as to which he submitted to an accounting. They were upon the lists of about 7,500 claims referred to in the answer as registered in a book in defendant's office. The inspection of that and other books was tendered by the answer in lieu of the discovery prayed for by the bill (p. 24). The book was offered in evidence by the defendant (p. 79). After the account was ordered, and after the defendant was required to produce this book before the Auditor, he erased from it all of these half-number cases (p. 147), but the Auditor held that it was too late to withdraw these cases from the accounting.

DEFENDANT'S THIRD EXCEPTION

relates to the fee received by him from George Phillips of Key West, Florida.

The fee in this case was originally entered on the defendant's book as $500. After the book was called for, and after a great deal of trouble to compel its production before the Auditor, and before it was produced, the defendant caused another entry to be made on the book to the effect that the fee in the case was $301.02, and $207.48 was a gratuity by Phillips to the defendant (pp. 141 and 142). The original contract with Phillips was for a fee of twenty-five per cent. The allowance to him being a great deal more than he had expected, the defendant wrote him soliciting a larger fee. Phillips replied offering $500, part cash and part in one year with interest. Defendant replied accepting the offer, and $400 was paid in cash and $100 with interest was paid a year later (pp. 148 and 149).

It thus appears that this $500 was a fee for services rendered. That the client was under no obligation to pay more than twenty-five per cent. of the amount received by him can make no difference. The payment of a larger sum as a fee for his services was requested by the defendant and agreed to by Phillips. The old contract was abandoned and a new one substituted. The defendant's contract with the complainant was to obtain all the claims he could, and to make contracts for fees equal to twenty-five per cent. of the collections; and he sold to complainant one-fourth of his fees in cases then in hand and all that he could thereafter secure. Complainant therefore took a one-fourth part of any fee obtained by defendant, whether more or less than twenty-five per cent.

DEFENDANT'S FOURTH EXCEPTION

is to the refusal of the Auditor to allow his claim for expenses alleged to have been incurred in the collection of fees, which expenses, he says, amount to twenty per cent. of the fees collected.

In respect to this exception it is proper first to note that all actual, direct, and necessary expenses paid by the defendant in the collection of these fees were allowed him by the Auditor—such as bank charges, express charges, collector's

percentages, attorney's fees, &c. See testimony filed with Auditor's report, Record, pp. 112, 113 and 123.

The defendant's exception, therefore, relates wholly to the Auditor's refusal to allow the defendant certain expenses incident to carrying on his business—such as office rent, clerk hire, postage, stationery, printing, and the like.

As to these expenses the defendant is concluded by the decree of the Court passed in this case on the 23d day of March, 1888 (see p. 108 of the record). The defendant had, by his answer to the bill (see pp. 18, 20, 23 and 24 of the record), made claim against complainant for the same expenses, alleging that complainant had expressly agreed to pay a part of the expenses of prosecuting these claims after the contract in writing between them was made. He failed to prove the agreement and his claim was disallowed by the Court. A claim for identically the same expenses, viz: Office rent, clerk hire, postage, printing, &c., is now restated as the expense of collecting the fees, and an allowance therefor is demanded under another guise.

The plan now adopted by the defendant is to charge against the fees collected *one-half of all his expenses* for the years 1883 to 1887, and *all his expenses* since January 1, 1887.

These alleged expenses are wholly estimated; not a single receipt or voucher is produced in support of them; no charge was made nor any memorandum preserved of any item. And while one-half of the expenses of the years 1883 and 1884 are claimed as expenses of collecting fees, no fees were collected in 1883, nor during the first five months of 1884.

The amount of these indirect and incidental expenses is finally stated by the defendant to be $33,048.20 for collecting fees amounting to $165,241.80—*exactly* 20 per cent. See statement filed with Auditor, and which the defendant testified was correct. (Record, p. 152).

It looks as though these figures had been forced to suit the emergency. Taking them, however, to be correct, does the outlay appear to be reasonable or necessary?

If, under any circumstances, the complainant could be charged with any part of the expenses of collecting the fees it would be incumbent on defendant to show that the ex-

penditure was necessary and reasonable. He has offered no evidence in this regard.

All this expenditure for clerk hire, office rent, postage, printing, &c., seems to have been made for the *sole purpose of sending out circulars to the persons from whom the fees were to be collected.* He says he had them printed and sent out one after another, sometimes twenty and fifty to the same person. See testimony filed by Auditor (Record, p. 158).

To expend over $33,000 in this manner (and this is the only use of the money attempted to be shown) is not only unnecessary and wasteful, but would probably do more to defeat than promote the object sought.

This expense account, upon which the defendant has bestowed much attention ever since this suit was brought, was finally formulated and filed with the Auditor, and is as follows:

"*Summary statement of gross amount of fees collected on Postmasters' claims.*

In 1884	$7,877.95
In 1885	26,705.77
In 1886–7	45,658.08
In 1888–9	85,000.00
Total	$165,241.80

Summary statement of money necessarily paid out in consequence of change of the law and Department Circulars, from above-mentioned gross collections in order to effect such collections, namely:

Clerk hire	$15,608.24
Office rent	2,540.00
Postage	6,375.00
Stationery, printing, &c	5,959.18
Miscellaneous expenses	2,565.78
Total money paid out of said gross collections	$33,048.20

The net fees collected is therefore eighty per cent. of the gross collections."

It will first be observed that the amount of fees collected, as shown by this statement, is less by $32,000 than the

amount of fees as stated in defendant's answer. See record, p. 23

According to this statement the expense of collecting was twenty per cent. of the whole amount collected. The answer says such expense was ten per cent. See record, p. 23. 20

An examination of the two items of postage and miscellaneous expenses contained in this statement will serve to illustrate the degree of accuracy with which this expense account was made up. It was filed with the Auditor May 22, 1889, at which time defendant testified as to the method of making up the statement, and stated unqualifiedly that it was correct. See record, p. 152.

On cross-examination, at pages 156–9, he gave the amount of postage said to have been expended in each year, making the aggregate of $6,375 contained in the statement; but when pressed to state how the item of miscellaneous expenses, $2,565.78, was made up he was unable to answer as to the details of it from memory, but said he would furnish a full statement of the expenses embraced therein at the next session.

On the 5th of June following, instead of elucidating the item of miscellaneous expenses, he reduced it from $2,565.78 to $143.50, and added enough to the postage item to just preserve the ratio and make out the twenty per cent. claim.

These statements, made within a few days of each other, and both sworn to as correct, are here placed in parallel columns for comparison :

Statement made at session May 22, 1889.		*Statement made at session June 5, 1889.*	
Half of postage from Mar. 3, 1883, to Jan. 1, 1884..	$750.00	Half of postage from Mar. 3, 1883, to Jan. 1, 1884..	$865.00
Half of postage in 1884....	1,000.00	Half of postage in 1884....	730.00
" " " " 1885....	1,000.00	" " " " 1885....	1,600.00
" " " " 1886....	1,500.00	" " " " 1886....	2,920.00
Whole " " 1887....	750.00	Whole " " 1887 ...	1,300.00
" " " 1888....	1,000.00	" " " 1888....	1,240.00
" " 5 mos. 1889	375.00	" " 5 mos. 1889	518.50
Add miscellaneous Ex....	2,565.78		
	$8,940.78		$9,173.50

Attention is called to the fact that there were in all about 13,000 claimants who were clients of defendant, to whom compensation was found to be due and from whom he was entitled to fees, and according to his testimony (the latest and, hence, supposed to be the best), he spent $9,173.50 in postage in sending them circulars in relation to payment of fees. Supposing he paid full letter postage, two cents per ounce, this sum would pay for delivering to each client about two and one-fourth pounds of dunning circulars, or four and one-half pounds if sent as second-class matter.

It would require strong evidence to show that this course (if pursued) did not do more harm than good.

It is not pretended that the complainant was ever consulted about the alleged expenditure for the collection of these fees. He never, expressly or by implication, authorized such expenditure and had no knowledge of them.

No contract can be implied with reference to services or expenditures, or labor performed by one tenant in common, for the benefit of the property held by them mutually. There must be an express contract or there can be no liability.

Franklin *vs.* Johnson, 1 Johns. Ch., 165.
Cooper *vs.* Tomkie, 9 Ad. and E. (N. S.), 936.
Ganel *vs.* Hannah, 5 H. and J., 412.
Causten *vs.* Burke, 2 H. and G., 295.
Mumford *vs.* Brown, 6 Cowen, 475.
Doane *vs.* Badger, 12 Mass., 65.
Taylor *vs.* Baldwin, 10 Barb., 590.
Calvert *vs.* Aldrich, 99 Mass., 74.

Chancellor Kent, in the case first above cited, says: "Each joint owner, in taking care of the joint property, is taking care of his own interests, and the law never undertakes to measure and settle between partners their various and unequal services bestowed on their joint business."

If defendant had expected complainant to bear any expense in collecting fees he might have transferred a proportionate number of the fee contracts to him, as provided for in the contract, and it would then have been the duty of complainant to collect the fees under the contracts so transferred and account for the same.

THE FIFTH EXCEPTION—INTEREST.

The court below sustained this exception and allowed interest on the balance found by the Auditor [redacted] from the time appellee made a formal demand for a settlement, August 9, 1887. (See appellee's letter making the demand and appellant's letter of refusal, Rec. pp. 59 and 60.) The average date at which interest should have commenced, according to the dates of the receipts of money as stated by the Auditor, which are admitted to be correct, would have been long prior to the 9th of August, 1887. The error here, if any, is against appellee. Indeed all that could be urged in this record as error from beginning to end is against appellee. The appellant agreed to and did sell appellee one-fourth of the gross amount of his fees. He had received more than $165,000 at the time of the accounting. Of this sum appellee gets by the decree below only $13,669.11. A desire to obtain a portion of what he is entitled to rather than to take the risk of losing all by a reversal of this decree for the error in it against him, has impelled appellee to dismiss his appeal and ask an affirmance of the decree below.

W. L. COLE,
Attorney for Appellee.

APR 24 1895
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 318.

HARVEY SPALDING *et al.*,
Appellants,
vs.
GEORGE MASON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF FOR THE APPELLEE.

W. L. COLE,
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Office Supreme Court, U. S.
FILED.
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BYRON S. ADAMS, PR., 513 ELEVENTH ST.

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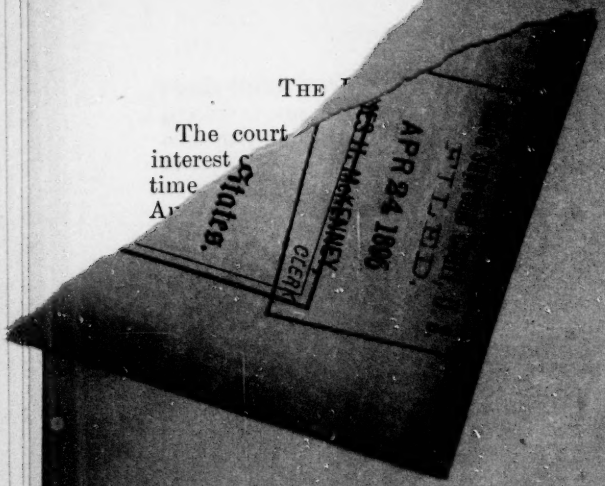

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SUPPLEMENTAL BRIEF FOR THE APPELLEE.

The appellants' brief in this case having been filed since the brief of the appellee was printed, I beg leave on behalf of the appellee to submit the following additional argument in reply to the

APPELLANTS' TWELFTH ASSIGNMENT OF ERROR.

This assignment of error is to the allowance of interest from the ninth day of August, 1887, by the decree of the court below.

The Auditor allowed interest on monthly balances, to which the appellant excepted, and the exception was sustained, and instead thereof interest was allowed by the decree appealed from from the 9th day of August, 1887.

It is respectfully submitted that the Auditor's report in this regard was right and it ought to have been affirmed, and that the error in the decree in respect to the interest was against the appellee.

The subject of the allowance of interest for the recovery of money due by contract has frequently been passed upon by this Court, and it is only necessary to call attention to a few of the later cases.

In Young *vs.* Godbe, 15th Wallace, 562, the Court says, at page 565:

> "If a debt ought to be paid at a particular time and is not, owing to the fault of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment."

In Holden *vs.* Trust Co., 100 U. S., 72, in error from the Supreme Court of the District of Columbia, the Court says:

> "If payment be not made when the money becomes due there is a breach of contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none."

In Dillman *vs.* Hastings, 144 U. S., 136, where a trust relationship existed between plaintiff and defendant, interest was allowed although it did not appear that defendant had received any interest.

In Shoemaker *vs.* U. S., 147 U. S., 321, it was held:

> "Interest accrues either by agreement of the debtor to allow it for the use of money, or in the nature of damages, by reason of the failure of the debtor to pay the principal when due."

In Stewart *vs.* Barnes, 153 U. S., 462, the court said:

> "Where money is retained by one man against the delared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss."

Nor is it necessary that the amount due should be definitely ascertained, or admitted, in order that interest be allowed. The following cases are cited in illustration of this principle:

West Republic Co. *vs* Jones, 108 Pa. St., 55.

> This was an action of assumpsit for agreed price of iron ore sold by sample. The defence was that the ore delivered was not according to sample. In answer to an exception to the ruling of the court below in respect to interest, the Court of Appeals held that interest should be allowed in all cases of contract where it is the duty of the debtor to pay money without a previous demand by the creditor. When a definite time is fixed for the payment of money the law implies an obligation to pay damages by way of interest at the legal rate for the detention of the money after the breach of the contract for its payment. The right to interest depends not on discretion, but upon legal right. Generally, in this country, interest is looked upon as an incident to the money, to be paid with the principle when the latter has been withheld after it became the duty of the debtor to pay it. A *bona-fide* dispute as to the amount of the indebtedness is no bar to the accruing of the interest. If a tender of payment falls short of the sum found to be due at the time of the tender, interest runs on the whole.

To the same effect is:

Van Ransellear *vs.* Jewett, 2nd N. Y., 135.
Adams *vs.* Fort Plains Bank, 36 N. Y., 255.

Early *vs.* Friend, 16 Gratt, 21.

This was a suit in equity by tenants in common of salt mines and other lands against their co-tenants for an accounting for the use and occupation of part of the premises by the defendant, and rent collected for other parts of the property. The defendants claimed by their answer that upon an account being stated a balance would be found in their favor. The account was stated by a commissioner and exceptions were taken to the report by all parties. The court held that (p. 58) the defendants being accountable to their co-tenants for a reasonable rent of the property and not for the issues and profits of their operations thereon, ought to pay interest on the rent of each year from the end of such year until payment.

Huff *vs.* McDonald, 22 Ga. 131.

This is the suit of tenants in common against co-tenants for account of gold mining property and for discovery.

The answer denied the title of complainants, and denied that profits were made.

The court in its charge to the jury says (p. 161):

"A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his co-tenant, who, therefore, stands to him as his principal. He, consequently, is bound to pay his co-tenant the actual profits which he has made out of the surplus, as well as the surplus

itself. Gold of the purity of that taken from the mine is, for all practical purposes, equivalent to money. It must be presumed that the defendants made profits on the surplus of gold received from the mines equal at least to what would have been the interest on that the same amount of money."

The charge is approved by the Supreme Court upon appeal (p. 161).

The appellant being under contract obligation to pay the appellee his share of the fees from time to time as the same were received, no demand for the payment thereof by the appellee was necessary to entitle him to interest, but, if a demand were necessary, the evidence shows that repeated demands were made by the appellee. On page 95 of the record will be found the following testimony by the appellee:

"He excused himself from making payments to me on the ground of his great necessities from one year to another, saying that if I would allow him to take what came of these appropriations, excepting the few sums he gave me, I should be provided for in the next. This went on until 1887, when I thought that if he could not pay me money, he could at least make an accounting or render an account, and I called on him on the 9th of August, 1887, for such an account."

This is corroborated by the appellant's testimony, pages 57, 58, 137, and 138.

When the written demand of August 9, 1887, was made (p. 58) the appellant by his letter (p. 60) denied that he had received any considerable sum on account of fees in these cases although the account stated by the auditor shows (p. 116) that date he had received $11,592.20 of fees due to the appellee which came into his hands, as follows: